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STUDIES

András BRAGYOVA

The Concept and Nature of Contractual Obligation

1. Introductory definitions: contract and contractual relation

'Contract' and 'contractual obligation' are concepts recurrent in political, moral and legal theory in many different contexts. Quite often it is not at all clear how to distinguish the concept of contract from other related notions like agreement, promise, consent, duty and the like. In this essay I attempt to clarify some of these concepts and their interrelations, but first I wish to investigate of the concept of contractual obligation. My analysis intends to examine the general concepts of contract and that of contractual obligation; in other words, it tries to clarify a general concept of contract, that is to discover the common elements in the use of 'contract' and 'contractual obligation' in different fields, such as moral, political theory and law, including the diverse application of these concepts in various fields of law, e.g. in private law, labour law, administrative law and international law.

I will argue that it is necessary and useful to distinguish between 'contract' and 'contractual relation'. 'Contract' is the act of agreement (the basis of the obligation) while the contractual relation is the set of normative relations (claims, rights, immunities etc.) *resulting from* the contract,[1] in the sense that

1 HOLLAND, Th. E.: *Jurisprudence,* 13. ed., Oxford, 1924, 25 1.

their existence in law or morals is due exclusively to the legal or moral existence (validity) of the contract. By the term 'contractual obligation' therefore I intend to embrace both the contract in the narrow sense and the contractual relation itself. In the political and social theory most authors use the term 'social contract' and other terms to that effect in this broader sense, the contract construed as a basis of various obligations of political or moral character. A 'contract' is a state of affairs—an act or a conduct and their context—to which legal (or moral, political) norms attach certain normative consequences, above all the existence of rights and obligations (and their modalities): they make up the contractual relation. Thus by 'contractual obligation' I shall designate any *Ought*—legal, moral, political, or other—based on, or derived from, a contract or quasi contract; that is, an obligation the validity of which is assumed to depend on the cooperation of the person bound by it. 'Ought' is used here as a substitute for *Sollen* i.e. describing any deontic qualification of an action (or conduct) of an agent.[2] Later I will suggest a distinction between 'obligation' and 'duty' as two different kinds of *Ought.* I attempt to explore, as said before, the concept of contract (together with 'contractual obligation') as *a general concept* covering its legal, moral and political uses, although I will treat the *legal* concept of the contract (and that of contractual obligation) as the core or paradigmatic case of the meaning of the term. This move is sufficiently justified, I think, by the undeniable (historical) fact that the concept of social contract was borrowed from the legal usage, albeit obviously not strictly following its technical meaning in law or legal theory.[3]

Two other related concepts should be briefly elucidated: the concepts of 'obligation' and 'norm'. On the concept of obligation I will have to say more at a later stage. Nevertheless, it is important to state at the beginning that I mean by obligation generally any situation in which certain acts of a person are defined by a norm so that nonconformity with the norm is regarded as incorrect and usually followed by some kind of critical reaction. The idea of the norm is thus more general (more extensive) than that of the obligation: there are norms not imposing obligations but giving and protecting rights, conferring powers, giving permissions, or determining the conditions of validity of certain acts. All norms—or normative propositions—claim to guide human behaviour by describing

2 The term 'agent' designates any person in law or morals, not only human beings, treated as a distinct entity, such as firms, associations, States and the like capable to have rights and obligations.

3 See, for instance, LESNOFF, M.: *Social Contract*, London, 1986, 2 ff.

what persons ought to do (or not to do) in certain situations. It is important to add another remark too. The term 'obligation' (and the corresponding term 'right') is used rather confusingly in two different but interrelated senses: in one sense speaking of an 'obligation' or a 'right' signifies a *norm* conferring a right or imposing a *general* obligation; on the other hand, the term 'obligation' is used almost as often to refer to an *individual obligation,* or a right, of a person. An individual obligation is normally seen as a general obligation applicable in a certain state of affairs. Accordingly, if there is a general obligation or duty—a general norm prescribing to any person with certain properties—to send the tax return in a certain moment to a certain address and there is an individualised one that of an individual **A** to return it.[4] In other words, norms contain *generic terms* in describing the action required (or prohibited, permitted) by them, while obligations and rights concern the acts required from individuals, therefore they can be described using individual names. For this reason certain legal philosophers, most notably Kelsen,[5] prefer to speak of 'general' and 'individual' norms, the latter including judicial and administrative decisions. Another category, 'legal relationship' (*Rechtsverhältnis* in German) is used to describe any human relationship regulated by legal norms. The importance of this distinction will be clarified later in this paper.

2. The concept of contract

The concept of contract as an act *creating—being a source or basis of*—legal, moral or political obligations is not so simple as one might suppose. The core of the concept of contract is expressed in the name of the old common law writ: *assumpsit*;[6] i.e. an obligation created by the 'free' act of the obligee. Thus, a contract is an archetype, as it were, of the obligation (or duty) based on the autonomy of the person obliged or in other words an obligation—a restriction of the freedom of action of a person—based on the liberty of the person the

4 I relied here in substance on HART, H. L. A.: *The Concept of Law*, 2. ed. Oxford, 1994, 82 ff.

5 See e.g. *General Theory of Law and State*, transl. A. Wedberg, Cambridge, Mass. 1946, and *Reine Rechtslehre,* Vienna, 1960; see also his posthumous work, *Allgemeine Theorie der Normen*, ed. R. Walter Vienna, 1979.

6 See for example SIMPSON, A. W. B.: *History of Contract in Common Law,* Oxford, 1975 see also HOLMES, O. W.: *The Common Law*, 2. ed. by M. DeW. Howe, Cambridge, Mass., 1963, 195.

whose liberty is restrained. Thus contracting is, generally speaking, the practice of self-binding, self-obligation. For this reason, certain anarchist thinkers, such as Proudhon,[7] do not recognize as binding but contractual obligation. In sum, the idea of contract is closely, indeed inextricably, linked to the notion of 'voluntary obligation'.[8]

In the following I attempt to define the concept of contract. By 'contract' I suggest to mean a specific set of facts—operative facts—capable *to create (or generate)* contractual obligations. Therefore, it includes not only the most obvious cases of contracting but other acts capable to generate obligation of the actor of the same type as an obligation existing within a contractual relation.

The operative facts creating contractual obligation are defined by certain norms, since it is easy to see that no fact—like the fact of having uttered specific words such as *'spondeo'*—is in itself capable to create an obligation, that is to become a contract. The obligation-creating effects of certain facts *depend on non-contractual norms* defining the moral, legal etc. effects of certain human acts as creating obligation, e.g. through defining the conditions of validity of agreements, promises etc. Thus, the 'source' of an obligation is not the voluntary act of a person (a State, an agent etc.) as such, but rather the voluntary act *and* the norms endowing them with the effect of creating an obligation. Consequently it is well-founded to say that an obligation resulting from a contractual situation is only *partly* 'based' on voluntary acts (promise, agreement, consent and the like); the other component in the basis of the contractual obligation is the set of rules constituting the obligation-making as a 'practice'.[9] In other words, any contractual obligation presupposes the independent existence of the rules constituting the obligation-making. I must add that the view just set out depends on the acceptance of the separation between

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7 PROUDHON, P–J.: *Du principe fédératif, Oeuvres complètes*, Paris, 1868, tome VIII., 44.: '...le régime libéral est contractuel'. Proudhon argues in this book for a 'contrat politique' which he equates with the federation principle he vindicates. For an influential modern view to similar effect see WOLFF, R. P.: *In Defence of Anarchism*, 2. ed. Berkeley, 1998, 15.: 'For the autonomous man, there is no such thing, strictly speaking, as a *command*.' (Original italics.)

8 MACCORMICK, N. D.: 'Voluntary Obligations' repr. in his *Legal Right and Social Democracy*, Oxford, 1982, 190.

9 I use the concept of 'practice' in the sense defined by John RAWLS in his 'Two Concepts of Rules' 64 *Philosophical Review* 1 (1955) reprinted many times e.g. in FOOT, Ph. (ed.): *Theories of Ethics*, Oxford, 1967. A 'practice theory' of obligation is exposed by Hart in 'Legal and Moral Obligation' in MELDEN, A. I. (ed.): *Essays in Moral Philosophy*, Seattle and London, 1958.

Is and Ought, at least in its moderate (and in my view logically certainly correct) version, which asserts that it is logically impossible to deduce from a set of 'Is' propositions an 'Ought' proposition. It does *not* claim in particular that it is impossible to deduce from a set of Is *and* Ought propositions an Ought proposition.[10]

Consequently, the definition of the basis of the contractual obligation is the description of the content of norms (or rules) constituting the contractual obligation. If there were no such norms, it would be simply meaningless to distinguish between valid and invalid contracts (or obligations based on contracts). These norms, let me mention it in passing, are constitutive in the sense that they do not impose obligations (and still less duties): they simply define the *conditions of validity*—or normative existence—of obligations; they do not *prescribe* anything but only describe the 'felicity conditions'[11] of an act (or acts) intending to create obligations. They are similar to the rules of a game, such as the rules of football defining the conditions of a 'goal'; so I prefer to call them 'rules' rather than 'norms'. The rules constituting the basis of contractual obligations are of two kinds: one type of these rules defines, albeit *indirectly* (or negatively) the *content* of the contractual obligation by determining what may not be the content of a contractual obligation. (For example, the statement that nobody may oblige herself to slavery is such a rule.) These rules are said to be 'power-conferring rules'[12] because they determine the powers—that is, competences to oblige themselves validly—of the participants of a contractual obligation. Second, there are rules of *procedure* (in the strict sense) describing the *ways* obligations are created: these rules, in particular, designate the acts that count as an expression of the 'will' or intention to be bound, or the acts that are *regarded*, irrespective of actual the intention of the person to be bound, as a basis of an obligation. Rules of the latter type are, e.g. the rules defining the conditions of validity of *tacit consent*. (The famous argument of Locke on the expression of tacit consent by using a

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10 The question of the relationship between is and Ought (*Sein* and *Sollen*) or Facts and Values is, of course, much more complicated, but I shall not pursue this problem here further. For a general overview see: MACKIE, J. L.: *Ethics: Inventing Right and Wrong*, London, 1977, 64 ff.

11 This term is borrowed from AUSTIN, J. L.: *How To Do Things With Words*, Oxford, 1962.

12 HART: *The Concept of Law*, esp. 26 ff. and RAZ, J.: *The Concept of a Legal System*, Oxford, 1970, 156 ff.

highway[13] is, from this point of view a definition of a rule determining the acts counting as consent.)

Thus, in defining the concept of 'contract' as a basis of contractual obligations, I shall try to define the acts or situations capable to create contractual relations; this is equivalent to the description of the content of the rules constituting contractual obligations: I shall call it *contractual situation*. A contractual situation is characterized by certain rules that are capable to distinguish the contractual situation from other social practices and acts (or facts) creating obligations or (as we shall see, duties). These rules are either substantive or procedural. The two fundamental substantive rules of the contractual situation—which determine indirectly the permitted content of obligations—are equality and freedom of the actors. The rules of procedure of the contract situation are the exclusion of coercion from the relationship and the rule of unanimity. They are the characteristic features of *any* contractual situation whatever, thus covering a wide range of situations from commercial transactions or everyday promises to international conventions. The state of nature as assumed to have existed in certain social contract theories is also a case of a contractual situation. I will now examine these rules in detail.

By the *freedom* of the actors in the contractual situation I mean what might be justly regarded as the most decisive characteristics of a 'contractual situation'. The concept of freedom is too complicated to be discussed here; fortunately it is not necessary either, since the freedom I have in mind means simply two things. First it signifies the *absence of duties* (or other conflicting obligations) binding the actors (or subjects) of the contractual situation; second it denotes the rule that the actors are deciding without external constraints the creation of an obligation binding them. The concept of 'external constraint' includes not only duress or undue influence but also fraud and other improper influences to that effect.[14] It includes, of course, freedom from direct coercion, but this point I shall examine separately below. A contractual engagement is the use of the legal or moral freedoms—in normative terms: powers or competences—actually possessed by the actors. Thus the famous constitutional or general legal principle of the freedom of contract[15] might rightly be thought

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13 *Two Treatises of Government*, Second Treatise, para 119.

14 See in general WERTHEIMER, A.: *Coercion*, Princeton, Princeton University Press, 1987, 19 ff.

15 See ATIYAH, P. S.: *The Rise and Fall of the Freedom of Contract*, Oxford, 1977 for the English law; and GILMORE, F.: *The Death of Contract*, Columbus, 1974, for the American. In continental Europe an influential work was RIPERT, G.: *Le régime démocratique et le*

of as a specific case of the general, all-encompassing freedom of action: the content of a contractual obligation may be anything the person is free to do not to do. The restrictions on the freedom of contract imposed by moral or legal duties or prohibitions should be judged accordingly as justified or unjustified restrictions on personal liberty.

The *equality of the normative powers* of the actors (or participants, contractors) in the contractual situation means that they possess the *same general* normative powers to oblige themselves. This, of course, presupposes that any actor of the contractual situation has certain *powers or 'rights'* (or, more exactly, 'liberties') which he or she disposes of freely (in the sense described above). Examples of such powers in various contractual situations are the right to property, the personal liberty, the sovereignty of the State or the unlimited freedom of those being in the state of nature. The requirement of equality concerns only, as mentioned before, the general powers of the actors, not their particular features; so, in international law a State is sovereign if it has certain general powers which does not exclude that legal restrictions are put on their exercise (e.g. neutrality or membership in supranational organisations).

The two other principles are not tautologies, as one might think they are, on the ground for example that coercion by definition excludes freedom. The two other constituent characteristics of contracting are—in contradistinction to the two features just discussed—*procedural*, while the first two are, as mentioned above, substantive. The *exclusion of coercion and unanimity* define the *procedure* of contracting and not its substantive preconditions, not the permitted range of contents of contractual obligations, but the actions capable to create them. They are the procedural expression of the freedom and equality of the virtual contractors. The 'procedural' nature of these features of the contractual situation means that the two twin principles—I call them principles, because they are condensed expressions of a class of more detailed rules—exclusively the acts leading to the creation of an obligation (including its conditions of validity). An appropriate example of this kind of rules is the law of international treaties, as codified in the *Vienna Convention on the Law of Treaties* of 1969.[16] The law of treaties is the set of rules determining the procedure of making international obligations of contractual nature (in the sense it is used

droit civil moderne, Paris, 1936, Ch. V.: 'Le déclin du contrat' 269: '...la liberté contractuelle est le corollaire de la liberté individuelle'.

16 See SINCLAIR, I.: *The Vienna Convention on the Law of Treaties*, 2. ed. Manchester, 1984.

here) that is, the *acts capable to create obligation.*[17] Here too, technical details aside, the main procedural rules are the exclusion of coercion and unanimity: no international treaty is valid if the State purported to be bound by it expressed its consent under the influence of force, and no treaty bounds a State if it did not duly consent to it. Now, of course, the definition of coercion is not easy, although its meaning is rather clear: an obligation is valid only if the contractor agreed to it upon his own 'will', i.e. a decision is based on a relatively unconstrained choice. The range of acts counting as 'coercion' is rather wide: there is, generally speaking, a narrow interpretation and a broader one as for the acts or situations where the choice of the person is considered to be 'coerced' and thus invalid, i.e. non-free. It is impossible here to discuss in detail what coercion actually is or might be; the sole point is to note that this definition is always a rule (or norm). In each contracting practice there can be, and in fact are, different standards of what counts as coercion; the point is that the determination of the cases of coercion is definitely normative. From this contention it follows that there are no *a priori* cases of coercion independently of the rules of the contracting practice. In international law, for example, peace treaties where the coercion in the conclusion of the treaty for the common sense seems to be sufficiently clear, are definitely not regarded as 'coercion'.[18]

The *unanimity rule* excludes the imposition of an obligation to any contractor without its consent. Thus the unanimity rule defines the conditions of the *conclusion* of a treaty or a contract: its significance is that it states the requirements that count as an *agreement* between the contracting parties. Unanimity requires that each contracting party accept as binding a set of mutual rights and obligations: if there is no agreement of each of the contractors, the agreement does not exist. In other words, the unanimity rule gives a veto power to any contracting party. Another aspect of the unanimity rule is that it restricts

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17 This remark is important, because the Vienna Convention, and indeed most publicists, carefully avoid the use of the 'contract' or 'contactual' in respect of international agreements; one could perhaps say that 'contract' is under anathema in public international law. The underlying reason is, most probably, the intention to stress the independence of international law against undue private law influences, considered dangerous for the effectiveness of the international legal order. See LAUTERPACHT, H.: *Private Law Sources and Analogies in International Law,* London, 1927, 155 ('Treaties as Contracts').

18 *Vienna Convention on the Law of Treaties,* Arts. 52. and 62. See SADURSKA, R.: 'Threats of Force' 82 *American Journal of International Law,* 239 (1988) for an extensive treatment of the concept of force and related concepts in international law.

the personal validity of the contractual obligation (and, of course, that of the rights) created by the accomplished contract to those who accepted the obligation.

It is worthwhile to add that the rules of procedure of contracting do not exclude the influence of the contracting parties upon each other. The contrary is true: a contract is typically the result of negotiation (or bargaining).[19] Generally, a contractual situation is a (more or less pure) case of a negotiating or bargaining situation and the rules of procedure applicable for the creation of a contractual obligation could be regarded as rules constituting the preconditions of negotiation or bargaining. Thus, some sort of argumentation is constitutive to any contractual obligation: the agreement as an obligation-creating (operative) fact in contract is achieved by argumentation. I prefer to use the term 'argumentation' for its generality, since negotiation and bargaining are varieties of argumentation. Even some cases of a 'debate' can be appropriately regarded as a kind of contractual situation of argumentation, since a debate is intended to achieve agreement among its participants; though not conceptually inevitable, it is still possible that an agreement achieved in a debate is regarded as binding by those who agreed to it.

By 'negotiation' or 'bargaining' I mean a particular kind of argumentation: an exchange of offers on the terms of a possible agreement (contract) which are binding conditionally, i.e. upon the acceptance by the other party. 'Offers' are arguments since their purpose is to convince—to persuade, or induce to agree—the other party to accept (or consent to) the obligation preferred by the offeror. *Ex hypothesi* she has no other means than to make an offer capable to convince the other or to induce him to make a counteroffer. Later I will suggest a distinction between 'bargaining' and 'negotiation'; at the moment it is sufficient to say that bargaining is a kind of argumentation in which the force of an argument depends on the obligation (which is a future action) offered in exchange for another obligation or action. Thus, to anticipate what I am to say later on, bargaining is a case of argumentation which could be regarded as the archetype of an 'instrumental discourse' in the sense given to it by Jürgen Habermas:[20] it is an argumentation procedure in which the only criterion for the acceptance of an argument is the (subjective) utility of the offer. A typical bargaining is

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19 See FRIED, Ch.: *Contract as Promise: A Theory of Contractual Obligation*, Cambridge, Mass., 1981, 28 ff.

20 See e.g HABERMAS, J.: *Theorie des kommunikativen Handelns*, Frankfurt a. M., 1981, Vol. I, 384 ff.

a game in which the participants try to achieve an equilibrium (or equivalence) between (the value of) their mutual rights and obligations.[21]

The core case of the contractual situation is, obviously, the contract, or agreement achieved by argumentation, although, as we shall see, other important cases are falling within it too. The legal concept of the contract in itself is not so simple however. In the Anglo-American tradition the contract is conceived mostly as a *promise or exchange of promises*,[22] while another school of thought defines contract as a legally *enforceable agreement*.[23] It seems to me that the agreement theory fits much better the idea (and the reality) of contractual situation than the promise theory. A promise is a unilateral act—or so it appears. In fact, a promise is binding on the promisor only if there is somebody else who accepted it or relied upon it; thus a promise is similar to an offer which usually binds temporarily the offeror but its obligatory force depends on the acceptance of the offer. A promise is, as it were, but a half of a contract; it is capable to create an obligation only if accepted by somebody else either expressly or tacitly by relying upon it. A unilateral promise—a promise made without the expectation of a return, in Anglo-American legal terminology 'consideration'[24]—might well bind the person *pro foro interno* but hardly as a matter of legal or moral obligation, unless someone accepted it or relied upon it. The latter case (reliance upon the other's promise by acting upon it) is a borderline case between contract proper and quasi-contract or contract-like cases which will be examined below. Still, reliance is inherently contractual since the action of the other party is a precondition of the binding force of the promise at any rate against anybody else but herself. (An obligation toward oneself is not a genuine obligation, for it is impossible to speak of an obligation one owes to oneself except metaphorically.) A suitable example to illustrate this contention is the well-known *Nuclear Tests Case* decided by the International Court of Justice:[25] the Court held that a declaration (interpreted as a promise) by the French government to terminate atmospheric nuclear tests on the Mururoa atoll

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21 This is, of course, not a technical description of bargaining as used in bargaining theory, but sufficiently clear in the present context, I hope.

22 ATIYAH, P. S.: *Promises, Morals and Law*, Oxford, 1981.

23 CORBIN, A. L.: *Corbin on Contracts*, St. Paul, 1952, 4 ff, 5–6 quoting the (American) Restatement of the Law of Contracts, and UCC 1–201.

24 In 'civil law', i.e. continental European, private law it is called a *cause* or *causa*. See GORDLEY, J.: *The Philosophical Origins of Modern Contract Doctrine*, Oxford, 1991, 137 ff.

25 *ICJ Reports*, 1974, 253, 267 ff.

was legally binding France. This statement of the Court is often interpreted as an authority establishing the binding force of unilateral promises in international law. A closer analysis does not, however, support this view, because the declaration was made (if it was intended to be obligatory at all) *in response to* the demands of other governments (Australia and New Zealand); thus the French government at most *accepted* these demands. Consequently the French declaration was a unilateral promise only if regarded in itself; in context it was a contractual engagement.

The standard case of contractual situation, as I have argued, is an agreement achieved through argumentation. But, admittedly, the scope of the 'contractual situation' is considerably wider than the case of explicit contracting. There are other acts of self-obliging equally capable to create obligations by the acts of the participants. These are frequently used in political, moral and legal theory to denote contract-type facts creating obligations, like 'consent', 'acceptance', 'acquiescence', 'recognition' or 'consensus'. These are indeed *obligation-creating facts* which differ from contracts proper in one essential respect: they are (in a sense) voluntary but the agent did not—or could not—influence the content of the obligation, since it is already given. In the case of 'consent' and similar obligation-creating facts consent is given to some claim, or proposed to a person or a State (generally, to an agent) for acceptance. On the ground of the distinction suggested earlier it is reasonable to say that the rules relating to consent and similar acts are *procedural*: they determine the instances that count as a 'consent', i.e. capable to create an obligation.[26]

In all these situations, one can observe the important difference between consent *ex post* and *ex ante*: in the case of *ex-post* consent, the consenting party assumes an obligation the content of which is predetermined: she has no choice but either to accept or to reject. Thus, it is necessary to distinguish between two components of the obligation: first, the description of the obligatory conduct, which is the content of the obligation; and second the *acceptance* of its obligatoriness. The two are *conceptually* different in the pure contracting too; but in the case of acceptance, consent and the like they are *separate*: the consent, or the acceptance *creates the obligation but not its content.* Consider for example the case of a State willing to join a treaty already in force (say the Treaty of Rome founding what later became the EC and the EU): it has no legal

26 Another meaning of 'consent' in moral and legal language is to render lawful what would have been unlawful without consent, thus converting by agreement an unlawful or immoral act into a permitted one. Thus, in these cases 'consent' means 'permission', and lies outside the practice of contracting, although some similarity is undeniable.

possibility to influence the content of the obligations under the Treaty, but to accept or not to accept its given content, called *acquis communautaire*. The same applies even more emphatically to the use of the concept of 'acceptance' or 'consent' in political and philosophical theory: the 'acceptance' of a legal system or the political authority of the State amounts to assume, as it were, a *blank* obligation. It accepts the *given rules* of the legal system relating roughly speaking to the formation (or validity conditions) of laws,[27] that is their *rule(s) of recognition*.[28] The rules of recognition have nothing to do directly with the *content* of the norms of the legal order: they serve to identify the valid norms in the system.[29]

Thus, it is reasonable to say with Joseph Raz[30] that consent changes the normative situation of the consenting person (agent); but it does only (or primarily) as regards the relationship of the consenting person to the norm—but not the norm or the obligation. One consents to something—a norm, an obligation, a claim, a proposal, an offer—which is already valid or at least already formulated, as the case may be. Consent is a significant act, because it indeed creates normative effects but not the (normative) content of the norm or obligation. In the case of the political obligation this seems to be clear: consent as the basis of political obligation[31] expresses an attitude (a Hartian internal attitude) to the political institutions of a community and to its legal order but it does not change the contents of the norms. They actually remain the same; the change distinguishing the pre-consent situation from the post-consent one is obviously not the content of the norms—although the content of a legal system (e.g. its respect of human rights) might very much influence a person's consent to a political regime or to a constitutional system.

Furthermore, consent might be validly construed from non-objection to a norm, rule or institution: this is the case of *tacit consent* (or *acquiescence*). This time I use an illustration from international law. Customary international law is a source of international law based on the 'consent' of States,[32] thus a rather

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27 See MACBRIDE, W. L.: 'The Acceptance of a Legal System' *The Monist* 49 (1965) 377.

28 HART: *The Concept of Law*, 94 ff.

29 Of course, rules of recognition can contain content-dependent criteria of validity too; even so, they do not change the content of norms, but their binding force. For this see HART: *The Concept of Law*, 250 ff.

30 RAZ, J.: *The Morality of Freedom*, Oxford, 1986, 82.

31 PLAMENATZ, J. P.: *Consent, Freedom and Political Obligation*, 2. ed., Oxford, 1968.

32 See generally WOLFKE, K.: *Custom in Present International Law*, Cracow, 1964 and A. D'Amato, *The Concept of Custom in International Law*, Ithaca, *1971*.

clear case of a tacit contractual obligation. Here again, 'consent' means agreement to norms (and normative facts, obligations) already 'given': the best example of it is the case of a new State which is held to be obliged by the customary norms of international law, although it could not have consented to them.[33] Nevertheless a newly independent State is *deemed to have consented* to the binding force of the norms of customary international law that are *valid* at the moment of its independence—that is, when it become a subject of international law—on the ground that it could not be a member of the community States *only by accepting* the general, mostly customary norms of international law. This argument is in fact a variant of the Lockean theory of consent applied to States instead of members of a political community. Indeed in international law, *acquiescence*, i.e. consent by non-protesting is the most important ground of the binding force of customary norms (which still form the basis of international law); on the other hand, a 'persistent objector'—a State consistently protesting against a customary rule, or more exactly against the binding force in its respect of this valid rule—may not be held bound (that is consented) to this norm.[34] Conversely, if a State does not protest for a sufficiently long time against a norm, it will be held having consented and has no power to revoke this (construed) consent.[35] By the way, this construction resembles to the Roman theory of customary law according to which customary law was based on *tacitus consensus populi*, since people did not revolt against it.[36]

In the case of consent and acceptance it is necessary to distinguish between the *validity* of a norm (or an obligation) and its *binding force*. Consent applies, at least in most cases, to valid norms or obligations: they already exist validly (according to certain validity criteria) when consent is solicited or sought to them. Consent (and acquiescence, acceptance) thus extends or reinforces the binding force of the norm or obligation by expressly recognizing their obligatory force. An example might illustrate this point: the oath of a soldier or an official does not add anything to his or her obligations (or, rather, duties) as defined in the valid laws relating to their services. The making of an oath might surely be interpreted as a solemn consent or recognition (reaffirmation)

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33 This case is discussed with his usual lucidity by KELSEN. See *Principles of International Law*, New York, 1952, 311.

34 The leading case is the *North Sea Continental Shelf* case, ICJ *Reports*, 1969, 1 ff.

35 So the International Court in the *Anglo Norwegian Fisheries* case, ICJ *Reports*, 1951.

36 See e.g. D. 1.3.32.1.

of their duties adding nothing to the content, but much to the *binding force* of their duties or obligations.

3. Obligation and duty

The distinction between the concepts of 'obligation' and 'duty' seems to me fundamental, although normally neglected in theory. The two terms are usually used interchangeably and thus usually treated as synonyms, although 'obligation' is more often used in the sense of 'voluntary obligation'.[37]

The core of the distinction proposed here is the idea that the term 'obligation'—in its moral, legal, political, or even religious use—in fact refers to two different kinds of situations of 'being bound by a norm' or 'action determined by a norm'. The essential difference between them is that in certain cases the validity of the norm (but not necessarily its content) depends on the agreement of the person bound by the norm; in other cases, on the contrary, the norm imposes the requirement to act—or not to act—in a certain way irrespective of the agreement, consent etc. of the person bound by it. I will call the first case 'obligation' and the other case 'duty'. Contractual obligations belong, of course, to the first category; for this reason I believe that the contrast between 'obligation' and 'duty' will contribute to the elucidation of the nature of the contractual obligation. It is important to emphasize that the ground of the distinction is not the *content* (the act required) but the *basis of its binding force.*

I begin with the examination of the *'duty'*. A 'duty' is a requirement to act in a certain way, so to speak, imposed from outside; its sources may be various, for example command, prescription, the status of a person (like in the case of 'natural duties'). Duties are valid and binding independently of the consent of the person bound by them; instead, a 'duty' presupposes a relationship of subjection between the norm-giving authority and the obligee.[38]

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37 See BRANDT, R. B.: 'The Concepts of Obligation and Duty' *Mind* 65 (1964) 374. See also SMITH, J. C.: *Legal Obligation*, London, 1976, esp. 34 ff. For an earlier treatment of the topic see LAMONT, W.: *The Principles of Moral Judgement*, Oxford, 1946, 78 (note).

38 Jean Bodin seems to have observed clearly the difference between the two types of obligations: 'le point principal de la maiesté souveraine, et puissence absolue, gist principalement à donner loy aux subjects en general sans leur consentement'. *Les Six Livres de la République*, 1, 8. (1576).

Moreover, the very existence of a 'duty' also presupposes that the norm-giving authority has a *coercive power* over the nom-subject: it has the power to *punish* or simply to coerce anybody acting contrary to the duty-norm. A 'duty'-type obligation demands *obedience* from the subject of the norm who is indeed subjected to the norm. Duty-type norms, are mandatory or imperative: they could not be set aside normally even by the consent of the beneficiary (if any) of it. A typical duty is a relationship between the norm-authority and the person obliged: obedience is owed to the authority; therefore, duties normally do not allow 'rights', except as a side-effect of the obedience to the norm.[39] For this reason the typical guarantee of a 'duty' is a punishment: a coercive imposition of an evil on the perpetrator of a breach of a duty by the authority imposing the 'duty'. A punishment is a threat of coercion or an actual infliction of an evil for the violation of the duty imposed; thus for the existence (validity) of the duty the reality or effectiveness, if not that of the coercion, but at least that of the threat is definitely a necessary condition. If the threat is not effective any more, the duty extincts, although its content can survive as an obligation. So, for a believer the wrath of God is a threat backing the religious duties; if he loses his faith (so that the threat ends) the duty is not a duty any more.

'Obligations' are in many respect different. Most importantly, an 'obligation' is valid (or binding) or only if the obligee consented or agreed to the creation of the obligation. This means in other terms that the validity and the binding force of an 'obligation' is conditional upon the consent given by the obligee; if this is invalid the obligation ceases to bind the obligee. An obligation is born out of a contractual situation and therefore, reflecting its structure somehow, consists typically of an exchange of rights and corresponding obligations between the subjects of the obligation. In an obligation-relationship any obligation of a person corresponds to a right of another; conversely, a right in those relationships coincides with the obligation of another. If an illustration is needed at all, a good one will be to point out that

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39 On the reflex theory of rights formulated (as it appears, independently) by Bentham and Jhering as a consequence of their command or duty theories of law see e.g. HART: 'Bentham on Legal Rights' repr. In his *Essays on Bentham*, Oxford, 1982 and JHERING, R.: *Geist des römischen Rechts*, Vol II. Leipzig, 1877. A pure command theory, like that of the German legal positivism in the 19th century could not allow, quite coherently from its own point of view, rights against the sovereign, just like Austin could not. For this reason is, among others, the work of Georg Jellinek so important, since he argued powerfully for the possibility of rights against the State (or sovereign) in public law; see his main work on the subject: *System der subjectiven öffentlichen Rechte*, Freiburg i. Br., 1887.

if I have a right against A to return me the book he borrowed, it implies that A is obliged to return the book within a reasonable time.

Furthermore, an obligation is not 'obeyed': it is *performed* or *fulfilled.* The consequence of its non-fulfilment is not a 'punishment' but rather the loss of rights: the violation of an obligation empowers the person, agent etc. whose rights were violated—and rights are coextensive with obligations—to suspend or not to fulfil her obligations. Obligations are not simply coextensive with the rights of others, but they are in an equilibrium with each other; therefore the claim to the fulfilment of an obligation is always dependent on the fulfilment of the obligations incumbent upon the person demanding its fulfilment. A contractual relationship consists of mutually dependent obligations binding the participants of the relationship: the binding force of them depends on the recognition of their binding force by the contractor. This is a corollary of the equality of the participants of the contractual situation and the rule of the exclusion of coercion which extends to the contractual relationship.

In obligation-relationships, the consequence of the violation of the obligation is typically—curious as it may appear—the *invalidation* for the future (i.e. termination) of the mutual rights and obligations based on the contract or quasi-contract. The violation of an obligation destroys the binding force of the contract: indeed it is at least an implicit repudiation or annulment of the contract as the ground of the obligation. Thus, it seems reasonable to argue that in obligation-relationships the sanctions are *positive sanctions*, or, in other words, *rewards*. The positive sanction—or 'reward'—is conceptually the moral or legal consequence of the fulfilment of the obligation: it is a right or a claim, conditional on the performance of an obligation. The non-violation, or even more the fulfilment, of the contractual obligation confirms and corroborates its validity and binding force: the 'reward' in this case is the continuing existence of the contractual relationship as a set of rights and correlative obligations. In an alternative but equivalent formulation, the binding force of the contractual obligation depends on reciprocity; consequently, the sanction of the violation is the non-obligation of the other contractor (or contractors) to perform their obligation towards the violator.[40] In a way, it is possible to contend that the sanction of an obligation is 'immanent' in the relationship.

The enforcement of contractual obligations by the courts is, strictly speaking, not the enforcement of the 'obligation': it is the *transformation* of an obligation into a duty, sanctioned by force. But even in these cases the

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40 Incidentally, this principle is clearly fixed in Article 60 of the Vienna Convention on the Law of Treaties.

enforcement is limited only to replacement services: in fact, the obligation as such is almost never enforced by the courts in its original (obligation) content. This illuminates perhaps the rationale of the view propounded by Oliver W. Holmes, claiming that there is no general legal obligation in common law to fulfil a contract, but everybody has the right not to fulfil his contractual obligation, provided he is prepared to pay the damages caused.[41]

As the example just mentioned demonstrates, it is perfectly possible that the same act or conduct be at the same time, or independently, object of an obligation or a duty. In such cases, however, the basis of the two obligations[42] should be clearly separated. For example, the obligation to obey the laws of the State is a legal *duty*; on the other hand, there could be, typically but not necessarily, independent grounds to obey the same laws as an obligation. This obligation might be based on consent to the law making procedures, or given in advance by voting and so forth.[43] But whatever the grounds of this obligation are, they are at least in part independent from the legal duty to obey; they must be somehow interrelated, but their validity may not depend on each other.

A final remark. The prominent theories of law—which are also theories on the nature of legal obligation—can be classified into 'obligation' and 'duty' theories; the same can be said of moral and political theories. Remaining in the domain of law, the command theory of Austin or the sanction theories of Kelsen, or that of the American realists, are 'duty' theories, since for them the paradigmatic case of the legal obligation is what I call 'duty'. Other theories, and most conspicuously the contractarian and a part the natural law theories, including consent or recognition theories, on the contrary consider 'obligation' as the paradigmatic case of legal obligation. This distinction applies only to their view on the ultimate basis of the obligatory force or validity of the law; it is not excluded that they allow the existence of obligations of the other type, provided they are subordinated to the other. For instance, in Hart's theory of law (and in particular that of the legal obligation) the 'rule of recognition' as the ultimate basis of the validity of law is 'obligation'-like, while he accepts

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41 *The Common Law*, 234.

42 I am aware of the fact that I use here and elsewhere *faute de mieux* the term 'obligation' in two different senses, first denoting 'voluntary obligation' and second, like in this case, as a more general term including both obligation *stricto sensu* and duty.

43 See e.g. SINGER, P.: *Democracy and Disobedience*, Oxford, 1973 and RAZ, J.: 'The Obligation to Obey the Law' in his *The Authority of the Law*, Oxford, 1979, 233., and SIMMONS, A. J.: *Moral Principles and Political Obligation*, Princeton, 1979. For a more recent comprehensive treatment see GANS, Ch.: *Philosophical Anarchism and Political Disobedience*, Cambridge, 1992.

that legal obligations are usually backed by force and sanctions, that is, they belong to the 'duty'-type.

4. Two types of contractual obligations: contract and convention

In this section I will argue to distinguish between two fundamentally different types of contracts and contractual obligations; I call them contract and convention. The difference between the two, I guess, is rather clear intuitively and certainly not new. A 'contract' is an *exchange of actions*—contents of rights and the corresponding obligations—based on a bargain, while a convention is an act creating general norms; a contract creates rights, claims, obligations (in the narrower sense) while a 'convention' is a *source of (general) norms*. The more relevant meaning for political and constitutional theory is certainly the contract as a 'convention', although in the legal usage mostly but not exclusively the first dominates. There are, however, norm-making contracts (or 'conventions'). The term 'convention' can be misleading, since it is used in other related meanings too; but I was unable to find a better one, and my choice is supported by the use of this term in international law, since the great law-making treaties are usually called there 'conventions'.

In the case of a contract *sensu stricto*, the agreement, consent etc. is the normative basis of certain obligations and rights while in the case of a convention the agreement, consent recognition is the basis of the *validity* (and binding force) *of a norm*. The value of the distinction between the two classes of contracts (and contractual relations) is often doubted if taken seriously at all. Nevertheless a distinction between the two types of contracts (or contractual relationships) was proposed by some thinkers, especially lawyers. An early exposition of the distinction between *Vertrag* (contract) and *Vereinbarung* (agreement) is due to German scholars, in particular to Bergbohm and Triepel.[44] I wish to argue that the distinction they proposed should be retained. Roughly, they saw the difference between a *Vertrag* and *a Vereinbarung* in the fact that in the case of a *Vertrag* the will of the contracting parties is directed to different

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44 BERGBOHM, K.: *Staatsverträge und Gesetze als Quellen des Völkerrechts*, Dorpat, 1877, TRIEPEL, H.: *Völkerrecht und Landesrecht*, Leipzig, 1899 and *Droit international et droit interne*, Paris, 1920. Triepel was inspired by H. Gierke's so-called *Genossenschaft* theory. See GIERKE, H.: *The Political Theories of the Middle Ages*, transl. F. W. Maitland, London, 1937. See also MCNAIR, A. D.: *The Law of Treaties*, Oxford, 1961, 739. ff, 743,

objects. For instance, **A** wants money, **B** a house, so they conclude a contract in which **A** sells and **B** buys the house, but this contract does not involve the same will. Unlike a *Vertrag*, a *Vereinbarung* is the union of the will of the parties: they agree to act together or crudely speaking their 'will' is united in the contractual agreement, so that they merge in a new common will (*Gemeinwille).* More importantly, according to Triepel in particular, a *Vereinbarung* is a contract to create *norms*: a *Vereinbarung* is a source of norms of law, while an ordinary contract (*Vetrag*) is not capable to create norms. Triepel adds that the *Vereinbarung* (convention) is, contrary to contracts which are normally concluded between two parties, made among several parties or at any rate their content does not exclude, on the contrary, the extension of their application to third parties who are not original contractors.

A contract is an exchange of obligations and rights, deemed to be the equivalent of each other (or at least the best possible agreement, given the circumstances). Here 'agreement' means, in fact, 'terms of exchange': the contractors agree in the exchange of well-defined goods, acts, services etc. They are not obliging themselves to do the *same*: just the contrary, since 'exchange' by definition excludes that the same good, service, etc. be exchanged. For this reason, the 'contract' is a bargain: its content is a *quid pro quo,* an undertaking to do (or sometimes not to do) something in return for somebody else's services (*do ut des, facio ut des, facio ut facias*).

A 'convention' is different in many significant respects. The most important difference appears to be that a convention is not a transaction, not a bargain, or exchange between the contractors. The essence of a convention is an agreement among the parties *to do the same in the same case*, or an agreement to *observe the same norm* (or norms). Here, by the way, the similarity with other meanings of the term 'convention' is rather clear.[45] Conventions oblige the participants to follow a norm as agreed. A convention is therefore the basis of the validity of a norm; the contractual obligation is to follow a norm, or more exactly the same norm. The consequence of this obligation might well be that the contractors acquire rights (and corresponding obligations) *vis-à-vis* each other; even so, these obligations and rights are contractual only indirectly, since directly they are based on the norm agreed upon to be observed by the contracting parties. To give an obvious example: the States parties to a law-making convention in international law, such as the conventions governing the law of diplomatic or consular relations of States or establishing a highly intricate system of interrelated norms as in the case of the law of the sea, do

45 See LEWIS, D.: *Conventions: A Philosophical Study*, Cambridge, Mass. 1969.

agree to observe the same rules for the status of their diplomatic representatives, consuls or agree to establish according to the same rules, say, an exclusive economic zone. An even more interesting example is the case of international conventions on the protection of human rights: in these conventions States are obliging themselves to protect certain rights of their citizens (or persons within their jurisdiction): that is, to observe certain norms which have *prima facie* nothing to do with other States at all. There is plainly a *reciprocity* even in the latter cases, but hardly an exchange: they oblige themselves to do in the same conditions the same thing (e.g. not to violate the immunities of the diplomats). This is of course not to say that the observance of the same norms does effect indistinctly and equally all the participants or contractors. This certainly does not hold: in international relations, most conspicuously, States are quite naturally endeavouring to agree with other States in the creation of norms that will best promote their interests or the values they prefer. But even this circumstance does not alter the fact that all these norms are binding all States to observe same norm.[46]

Conventions are, as remarked above, not bargains: the argumentation leading to their conclusion is a *negotiation* rather than a *bargaining*. The difference between the two concepts is not very clear and they are often treated as synonyms. I suggest a distinction between 'bargain' and 'negotiation' suitable to substantiate the difference between contract and convention. 'Bargain' is an argumentation process leading to an agreement based exclusively on the *utility considerations* of the participants. The term 'utility' borrowed from rational choice and bargaining theory shows clearly, I think, what I have in mind: a bargain is an agreement based on the perceived mutual interest of the contractors. Negotiation is, I suggest, different: it can involve some kind of interest or utility consideration, but it is essentially an argumentation process leading to (or intended to create) an agreement in *normative claims*, predominantly norms, or rights and obligations. The subject matter of the intended agreement in a negotiation is different: primarily it is

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46 It is a sociological observation that conventions are adopted (and in fact needed) in long-term, ongoing relationships, where the contracting parties are interdependent or otherwise closely and complexly connected: the community of States is an obvious example, but there are many others, such as labour relationships, universities, units composing a federal state; even firms or marriages can be regarded as 'sets of treaties'. Ian MacNeil calls this type of contract, or contractual relationship, 'relational', and speaks of 'relational contracts'; the contracts I call simply contracts he designates as 'discrete' contracts. See MACNEIL, I.: *The Modern Social Contract*, New Haven, 1981.

about normative claims; this involves that the negotiators use arguments capable to justify and convince others to accept a normative claim. For instance, in international law a negotiation may lead to a convention (in the sense used here) or, quite often, it is used as a means to decide the correctness of mutual legal (or political) claims. In both kinds of negotiations the agreement settles normative claims: the norm to be followed, or the rights of the parties in the case an alleged violation of the rights of others. In the second case, by the way, the subject-matter of discussion is the *retrospective* recognition of the validity of a norm—indirectly, by accepting the contention that it was violated.

5. Concluding remarks: contractual obligation and contractual justification

In conclusion I would like to suggest a last important distinction between the *contractual obligation* on the one hand, and the *contractual justification of an obligation* on the other. In this essay I attempted to analyze only the nature of the contractual obligation; I did not discuss the contractual justification of obligations of duties. At the end of, however, I would like make a few remarks on the latter.

The importance of these observations is due the peculiarity of contractual justification. Its attraction is explained probably by the fact that an agreement in a contractual situation has a content-independent and in a way conclusive justificatory force. The content of the agreement is justified simply by virtue of the fact that it was accepted freely by those who are bound by it. If the agreement (contract) is valid, there is no need for additional justification. Thus, its content might be regarded as the best available under the circumstances: if it were not so, the participants would have decided otherwise. In other words, there is no way verify the correctness of an agreement arrived at in a contractual situation, except its procedural validity (including the limitations, if any, of their content). This is the force, for instance, in the argument for sexual freedom between 'consenting adults': a valid agreement was been made, and it justifies itself. Hobbes is of the same view: '...it is in the laws of the Commonwealth as in the gaming: whatsoever the gamesters all agree is injustice to none of them'.[47] The justificatory force, it should be added, depends

47 HOBBES, Th.: *Leviathan*, Part 2, Ch. 30.

very much upon the circumstances (or upon the context, the rules) of the contractual situation; it has unchallenged strength only if the conditions are ideal and diminishes with the distance from the ideal situation. By far the most important case of this type of justification is, of course, the market: a market is a set of contractual relations and (barring government regulation) it consists *exclusively* of contractual relations. If the contracts underlying the contractual relations thus created were regularly (validly) made, they are perfectly, i.e. unconditionally, justified. No other justification is needed, nor is it permitted; any questioning of the outcome of valid contractual arrangements from an external (non-contractual) point of view is not simply unjustified, but unreasonable or just meaningless. Contracts validly concluded create by definition but internally justified obligations: they are '...actions justified because they are agreed to'.[48]

Contractual justifications do not create obligations, but justify existing ones. he most significant difference between *creating* and *justifying* an obligation (or for that matter any normative statement) is that a justification is, as it were, a meta-statement. Another important feature of the contractual justification of normative statements[49] is that they are counterfactual, as the contractual component in them is by definition non-existent. It is an answer to a counterfactual question of the following type:

> *if you were* in the position to accept or not no accept norm **N** in a contractual situation would you accept it?

Thus, contractual justification presupposes at the outset that *there was in fact no contracting situation* when the norm was made; it is not fictitious but rather *counterfactual*. For this reason, a contractual justification of an obligation (in the sense of an Ought or normative statement) is *not independent*. 'Non-independence' signifies here simply that the justificatory statement has no reason without the social practice of creating norms and obligations: it is, in a sense, parasitic upon them while the contrary does not apply.

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48 COLEMAN, J. L.: 'Foundations of Constitutional Economics' in COLEMAN, J. L.: *Markets, Morals and the Law*, Cambridge, 1988, 134.

49 See on this topic WELLMAN, C.: *Challenge and Response: Justification in Ethics*, London & Amsterdam, 1971 and AJDUKIEWICZ, K. (ed.): *Justification of Statements and Decisions*, Warsaw, 1962. I have profited much from Ch. Perelman's writings; I refer here to his *Justice et raison*, Bruxelles, 1963.

Contractual justification is conceptually possible only for duty-type obligations, since obligations are by definition contractual and thus contractually justified. Granted this, the counterfactual character of the contractual justificatory statement is clear: the duty is justified by establishing that the content—the conduct made obligatory, prohibited or permitted by the norm—would have been accepted by the obligee, if she were in a contractual situation as rational, reasonable or generally justified. Many, in modern times in fact most, contractarian theories are of this type: Rawls' *Theory of Justice*[50] or Buchanan's and Gauthier's theories[51] are perhaps the most appropriate examples. An equally pertinent example of a theory of contractual justification—as opposed to contractual *obligation*—is the theory of the 'ideal discourse situation' of Jürgen Habermas:[52] the ideal discourse situation, as he defines it, is a contractual situation which could never exist in reality; it is clearly counterfactual, test-like justification of norms (moral, legal or any other).[53]

Thus, a contractual justification of a duty or an Ought-statement is, at least in part, *cognitive* and not purely normative. Its claim can only be to help to ascertain the justifiability of an Ought-statement. In short, the contractual justification even if it is successful, has no independent normative force; to put it otherwise, it *is not a conclusive reason of action* in itself.[54] Its claim is to provide a partly cognitive, partly normative test to facilitate the discovery of unjustified norms or practices. A clear formulation of this point is offered by Leslie Green:

> [t]here is an important difference between regarding someone's actual agreement as a reason for later holding him to be bound by it and regarding an unmade agreement which it *would have been* rational to make as such a reason.[55]

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50 Cambridge, Mass., 1971.

51 BUCHANAN, J.–TULLOCK, G.: *The Calculus of Consent*, Ann Arbor, 1962, esp. Appendix 1 by Buchanan, 307 ff; and BUCHANAN, J.: *The Limits of Liberty*, Chicago, 1975, and GAUTHIER, D.: *Morals by Agreement*, Oxford, 1986.

52 See e.g. his *Moralbewußtsein und kommunikatives Handeln*, Frankfurt a. M., 1983, esp. 53 ff.

53 See COLEMAN, J. L.: 'Unaminity' in COLEMAN: *Markets, Morals and the Law*, 276, 281.

54 RAZ, J.: *Reasons of Action and Norms*, London, 1975.

55 GREEN, L.: *The Authority of the State*, Oxford, 1990, 161. (Original italics.)

An intermediate position was put forward by Hanna Pitkin[56] in her theory of 'hypothetical consent'. The hypothetical consent is not a 'real' consent i.e. consent actually given in some way, but it is not devoid of normative force since the hypothetical consent determines the conditions of a rationally valid *ex post* consent to the authority of the government (or perhaps to separate laws or institutions adopted or practised by them). It determines, in the words of Hanna Pitkin '...whether the government is such that you *ought* to consent it'.[57] Thus, the obligation Pitkin speaks of is partly genuinely normative, since it is expressly an 'ought', though not a contractual ought. This hypothetical consent is *cognitively* contractual in the sense that its contractual element is counterfactual and serves as a *criterion* making possible to *recognize* the quality ('worth') of the government and then decide whether one would have accepted it, if one were in the position to accept it in a contractual situation. Thus 'hypothetical consent' is best regarded as a theory furnishing devices to ascertain whether a government is good or bad, worth of consent or not. But it does not, indeed cannot, replace the actual morally binding consent. It is, at best, a *reason to consent*, but definitely not the *act* of consent.

The impression that the contractual justification, including hypothetical consent, has (or might have) an independent normative force by virtue of its rationality is misleading because its real basis lies elsewhere. Contractual justifications are better understood as *second-order justifications.* Second order justifications are justifications of the first order justifications; full binding force or validity can be attributed only to the first order justifications. In our case the first order justification is the contractual agreement, acceptance, consent and the like actually made; the second order justifications are arguments justifying the agreement or the consent given. In the case of a 'real' (actually occurred) contract the second-order justifications might be the reasons of the agreement (or consent) of the contractor to consent or, or the reasons one would rationally ascribe them. Valid contracts need no substantive justification, since contractual obligations are justified by the regularity of the procedure of agreement or consent. In the case of 'hypothetical consent'—and contractarian justification in general—the second-order justification serves to substitute the *ex hypothesi* non existent first-order conclusive justification.

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56 PITKIN, H.: 'Obligation and Consent I-II' *American Political Science Review*, 59 (1965) 990, 60 (1966). 39.

57 'Obligation and Consent-II', 39. (Original italics.)

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Balázs József GELLÉR

Laws Penalising Bias Speech and their Constitutionality in the United States

A. An overview of the cases developing principles governing bias crime laws

The difficulty in giving a fair account of "*group intimidation*"[1] criminal laws and their constitutionality in the law of the United States is twofold. Firstly, the duality of the federal and state constitutions and jurisdictions causes differentiation in the legislative and constitutional approaches. Secondly, the doctrinaire development of the constitutional scrutiny of ethnic intimidation laws, embedded in "fighting words"[2] jurisprudence. Therefore both of these paths have to be explored. Additionally, problems are created by the fact that speech, in terms of the U.S. Constitution, can involve expressive *conduct* as

1 I prefer to use the term "*group intimidation*" laws instead of "*racist speech*" or "*ethnic intimidation*" laws and other forms of definition, because the expression of the criminalisation which I intend to look at is often not restricted to racist speech, but comprises every type of expression attacking minorities, so-called "outsiders". (For an attempt to define racist speech, see LAWRENCE, F. M.: *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 Notre D. L. R. 673, note 3, 1993.)

2 *Infra* p2ff.

well as pure *speech*.[3] Thus it shall be attempted first to give a concise overview of the "fighting words" doctrine, and then to scrutinise the bias intimidation cases.

The Supreme Court first formulated the "fighting words" doctrine in *Chaplinsky v. New Hampshire*,[4] where a statute previously construed by the State Court to ban "*face-to-face words plainly likely to cause a breach of the peace by the addressee*"[5] was unanimously upheld by the Supreme Court. The defendant's conviction was based on his statement describing the city marshal as a: "*God damned racketeer and a damned fascist.*"[6]

The Court argued that the expression was without communicative value, thus likely to provoke the average person to retaliation and thereby cause a breach of the peace.[7] It stated *per* Justice Murphy that "*there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libellous, and the insulting, or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*"[8]

It is important to notice that breach-of-peace convictions could therefore be upheld if there was merely a *danger* that the listener would be incited to violence—there was no need to prove actual violence. Thus *Chaplinsky* became the standard case for the doctrine that breach-of-peace can be upheld where

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3 SCHNEIDER, R. G.: *Hate Speech in the United States: Recent Developments*, 269 in *Striking a Balance (Hate Speech, Freedom of Expression and Non-discrimination)* ed. COLIVER, S. (Article 19) London and Human Rights Centre, University of Essex, 1992). See, for example, *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *United States v. Eichmann*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 1990).

4 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). In this case a Jehovah's Witness publicly denounced organised religions. When the city marshal tried to escort him away, the defendant called him a "*God damned racketeer and a damned fascist*". See HURDLE, M. L.: *R.A.V. v. City of St Paul: The Continuing Confusion of the Fighting Words Doctrine*, 47 Vand. L.R. 1143 (1994).

5 315 U.S. at 573.

6 *Id.* at 569.

7 *Id.* at 574.

8 *Id.* at 571–72.

there is a mere danger of incitement to violence.[9] The Supreme Court measured the likelihood of a violent reaction and considered what language would be likely to cause an average person to fight,[10] and therefore defined the basic types of unprotected expression. This definition of what constitutes a "fighting" word can be split into two main categories: 1. words "*which by their very utterance inflict injury*";[11] 2. words which "*tend to incite an immediate breach of the peace*".[12]

Decisions following *Chaplinsky* indicated an intention to limit the broad applicability of the doctrine which it established.[13] In the light of these later cases, the "fighting words" doctrine seems to have been reduced to words which are "*likely to provoke an average person to retaliation, and thereby cause a breach of the peace.*"[14]

The doctrine was first substantially narrowed in *Terminiello v. City of Chicago*,[15] where the Court found a breach-of-peace statute overbroad and decided that a speech which merely causes anger or outrage is not to be considered as "fighting words". On the contrary, it held that creating dispute is a valuable function of speech. Speech, therefore, is protected unless the expression is likely to produce a *clear and present danger*[16] of serious evil.[17]

Subsequently, in *Street v. New York*,[18] the Court held that burning the flag was constitutionally protected speech, and did not constitute "fighting words", as this act was not intended to incite a violent response by any individual.[19]

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9 NOWAK, J. E.—ROTUNDA, R. D.: *Constitutional Law* (4th ed. Hornbook Series, West Publication Co., St. Paul, 1991), 1058.

10 *Supra* n5, at 573.

11 *Id.* at 352.

12 *Id.* For academic discussion, see GELLMAN, S.: *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L.R. 333, 369 (1991); HURDLE, M. L.: 47 Vand. L. R. 1143, 1148–49; LAWRENCE: 678, 710; SHEA, T. F.: *Don't Bother to Smile* 1, 9; DOWNS, M. A.: 60 Notre D. L.R. 629, 632 (1985).

13 NOWAK—ROTUNDA: 1059.

14 *Supra* n5 at 574.

15 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949), rehearing denied 337 U.S. 934, 69 S.Ct. 1490, 93 L.Ed. 1740 (1949).

16 For the *clear and present danger* test, see *infra* n43.

17 *Id.*

18 394 U.S. 576; 89 S. Ct. 1354; 22 L.Ed. 2d 572 (1969).

19 *Id.* at 592.

In *Cohen v. California*[20] the Court similarly stated that the "fuck the draft" words worn by the defendant on his jacket in a County Courthouse was also protected speech, because they were not a directed personal insult, that is, were not a direct insult towards any individual, and thus did not meet the requirements of the "fighting words" doctrine. One year later, in *Gooding v. Wilson*,[21] the Court declared a Georgia statute unconstitutionally overbroad, because it proscribed protected as well as unprotected speech, in penalising any person using, without provocation, in the presence of another, opprobrious words or abusive language, tending to cause a breach of peace to or of him.[22] It held, that words may not be banned merely because of their offensive or vulgar nature. It also appeared to further narrow the "fighting words" standard by requiring that proof be given that the specific individual addressed would be likely to react in an immediate, violent manner.[23]

1968 saw the development of an important test as a result of one of the draft burning cases. In *United States v. O'Brien*[24] the defendant and three other companions burned their registration certificates in front of a crowd. They were then subsequently charged under the Military Training and Service Act of 1948. The case raised the question of what *conducts* can be regarded as *speech*.[25] It is unacceptable, the Court held, that a limitless variety of conducts be labelled as expressions, which thus form a title for First Amendment protection. The Court was willing to presume that the action had a communicative element, but

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20 *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). In *Cohen* the defendant was convicted of violating a general Californian disturbing-the-peace statute, which prohibited malicious and wilful disturbance of the peace. The Supreme Court reversed the judgement, stating that the wearing of a jacket bearing an offensive expletive ("Fuck the Draft") in a Los Angeles courthouse was constitutionally protected speech. See SCHNEIDER: 274. For criticism of *Cohen*, see BICKEL: *The Morality of Consent*, 72 (1975).

21 405 U.S. 518, 92 S. Ct. 1103, 31 L.Ed. 2d 408 (1972).

22 *Id.* at 519. See GELLMAN: 357.

23 *Id.* at 528.

24 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968).

25 Analysis involving the expressive and non-expressive elements of a certain conduct becomes important with regard to statutes prohibiting the wearing of items and, for example, burning crosses (SCHNEIDER: 269). See cases *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichmann*, 497 U.S. 310. Both of these cases involved flag burning, the restriction on such activity was held to be unconstitutional. Compare with NIMMER, M.: *The Meaning of Symbolic Speech under the First Amendment*, 21 UCLA L.R. 29 (1973); GREENAWALT, K.: *O'er the Land of the Free: Flag Burning as Speech*, UCLA L.R. 925 (1990); ALFANGE: *Free Speech and Symbolic Conduct: The Draft Card Burning Case*, 1968 Sup. Ct. R. 1, 23–24.

the question remained of whether this was sufficient to justify constitutional protection. Thus *O'Brien* sets out a four-pronged test for establishing whether government regulation is sufficiently justified. This is the case if

1) it is in the constitutional power of the government;

2) it furthers an important or substantial governmental interest;

3) the government interest is unrelated to the suppression of free expression;

4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[26]

If a law has therefore failed the *O'Brien* test, it must then be analysed within general First Amendment principles. According to the Supreme Court the problem in a case such as *Tinker*[27]-which involved the wearing of armbands as a symbol of protest-was really one of balancing the student's First Amendment rights against the conflicting rules of the school authorities. Another area in which the Supreme Court has been called upon to elaborate the test set out in *O'Brien* concerns flag desecration statutes.[28] To sum up, it appears that *symbolic* speech cases do not present a different issue from *pure* speech cases once the court has determined that the activity being regulated or prohibited should be considered as speech.

Looking at the emerging principles of constitutionality of ethnic intimidation laws, Gellman believes that *"[a] good starting point for understanding the roots of modern ethnic intimidation laws is the only Supreme Court case reviewing the constitutionality of a group libel statute, Beauharnais v. Illinois"*.[29] The challenged Illinois statute—typical of those adopted by several states following the Second World War—criminalised the public exhibition of any publication which portrayed *"depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion"* and which exposed *"citizens*

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26 391 U.S. at 377, 88 S.Ct. at 1679. Compare with SCHNEIDER: 269, who only lists three elements of the test, leaving out the third point of the test.

27 One year following *O'Brien*, other forms of expressive conduct were brought before the Court. The wearing of black armbands to show objection to the Vietnam War was the issue in *Tinker v. Des Moines School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed. 2d 731 (1969). The Supreme Court held that such an act is closely akin to pure speech (393 U.S. at 505, 89 S.Ct. 736).

28 The first case was *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969). See also *Spence v. Washington*, 418 U.S. 405. 95 S.Ct. 2727, 41 L.Ed.2d 842 (1974); *Texas v. Johnson*, 491 U.S. 397 (1989); *United Sates v. Eichmann*, 497 U.S. 310 (1990).

29 GELLMAN: *supra* n12; 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952). Gellman also refers to *Terminiello v. Chicago*. See GELLMAN: 335 n1.

of any race color, creed or religion to contempt, derision or obloquy", or which was *"productive of breach of the peace or riots."*[30]

The Court affirmed the defendant's conviction under the statute for circulating leaflets which petitioned the Mayor and the City Council of Chicago *"to halt the further encroachment, harassment and invasion of the white people, their property, neighborhoods and persons by the Negro."* Justice Frankfurter in delivering the majority opinion, pointed out that ordinary libel laws were not subject to review under the First Amendment,[31] and that the individual's dignity and reputation could be associated with that of the group he belonged to. Thus there was no justification to treat group libel laws differently from those concerning private libels. Justice Black dissenting, nevertheless asserted that such a statute is equal to "expansive state censorship".[32] Justice Douglas also dissented, maintaining that the group libel concept could only be justified if it met the requirements of the "clear and present danger" test.[33]

The authority of *Beauharnais* has been weakened by later cases, although it has never been overruled.[34] The Court's developing protection of civil libel, and restriction on breach-of-peace and disorderly-conduct statutes which lacked reference to immediate danger of violence,[35] have overshadowed the authority of *Beauharnais*.[36] The most important of these decisions is the one of the Court of Appeals for the Seventh Circuit in *Collin v. Smith*,[37] where an ordinance prohibiting the dissemination of material which promoted racial or religious hatred was ruled unconstitutional.[38] Thus *Beauharnais* can be

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30 GELLMAN: *supra* 12 citing Ill. Rev. Stat. ch. 38, para 471 (1949) (repealed 1961); quoted in *Beauharnais*, 343 U.S. at 251.

31 BARENDT, E.: Freedom of Speech (Clarendon Press, Oxford, 1985) 166. Also compare with *Cantwell v. Connecticut*, 310 U.S. 269, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

32 343 U.S. 250, 271 (Black J., dissenting).

33 *Id.* at 285 (Douglas J., dissenting).

34 BARENDT: 166–167, referring to *Anti-Defamation League of B'nai B'rith v. FFC*, 403 F.2d 169, 174 (DC Cir. 1968) and *Tollett v. U.S.*, 485 F. 2d 1087 (8th Cir. 1973), in which private libel was held to be covered by the First Amendment. Compare with GELLMAN: 336.

35 See e.g. *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

36 GREENAWALT, K.: *Speech, Crime, and the Uses of Language* (Oxford University Press, 1989) 294.

37 578 F. 2d. 1197 (1978). For discussion, see *infra* n49.

38 See BARENDT: 167. Discussed at *infra* n49.

regarded as implicitly overruled by the Supreme Court's decisions on private libel.[39]

One of the most important decisions in this area was delivered in the case of *Brandenburg v. Ohio*[40] in which the Court reversed the conviction of a Ku Klux Klan group leader, who was found guilty under an Ohio statute. This law punished acts advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform. The Court unanimously asserted that "*decisions have vanished the principle that constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is thus likely to incite or produce such action*".[41]

Therefore, even expressions advocating violence were protected by the First Amendment, except "*where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action*".[42] Justices Black and Douglas in separate but concurring opinions asserted that the "clear and present danger" test[43] was not compatible with the First Amendment. There is only "clear and present danger", they stated, when the advocacy is likely to produce immediate violence or insurrection. Since the Ohio statute did not distinguish between the advocacy of a theory and immediate lawless action it was held, therefore, to be unconstitutional.

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39 Consider also GELLMAN: 336 n8 and SCHNEIDER: 272. For discussion, see BETH: *Group Libel and Free Speech,* 39 Minn. L.R. 167 (1955).

40 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

41 *Id.* at 447.

42 *Id.*

43 The "clear and present danger" test was developed in *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919) by Holmes J. in his judgement for the Court. In this case defendants were convicted of violating the 1917 Espionage Act by causing and attempting to cause insubordination in the armed forces. The Court held, however, that: "*the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the Congress has a right to prevent*". "Clear and present danger" thus reflected a question of proximity and degree. The problem is whether it is up to the legislator to decide whether a certain expression constitutes a clear and present danger to state security, or whether it is for the court to decide if such danger exists (BARENDT: 149).

Two other controversial cases are deserving of mention. In *Terminiello v. City of Chicago*[44] the Supreme Court overturned an ordinance prohibiting breaches of the peace. The defendant here had denounced Jews and blacks. Whilst the Court refused to rule on the question of whether a racially antagonistic speech was constitutionally protected, according to the majority opinion delivered by Justice Douglas, a function of free speech is to invite dispute: "*It may ... best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.*"[45]

Nevertheless in *Feiner v. New York*,[46]—a hostile audience case—the Court upheld the conviction of the offender under the State's disorderly-conduct statute. The speaker described the American Legion as a "Nazi Gestapo" and urged blacks to rise up in arms and fight for equal rights. In their dissenting opinions Justices Douglas and Black argued that a minimal threat of violence was not sufficient to justify the suppression of speech. They pointed out that the duty of the police lay in protecting the rights of the speaker by controlling those who threaten him with violence.[47] It is important to note that in this case insults were also directed against particular members of the audience, which was obviously not compelled to listen. However, the authority of *Feiner* has been undercut by later cases in which the Court has distinguished these on factual bases and has preferred to apply *Terminiello*.[48]

Two closely connected controversial cases in the late 1970's brought up once again issues of ethnic intimidation and free expression.[49] In *Collin*[50] the Court,

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44 337 U.S. 1(1949).

45 337 U.S. at 4, 69 S.Ct. at 896, 93 L.Ed. at 1134 (1949).

46 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295 (1951).

47 340 U.S. at 326–327, 71 S.Ct. at 309 (Black J. dissenting), and 340 U.S. at 331, 71 S.Ct. at 312 (Douglas J. dissenting).

48 See *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963).

49 See LAWRENCE: 68 N. D. L.R. 673, n2 (1993). Lawrence describes the "Skokie cases", consisting of two cases arising from the attempt by a group of neo-Nazis to hold a march in the predominantly Jewish Chicago suburb of Skokie, Illinois in 1977 and 1978. The first case was *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); 366 N.E.2d 347 (Ill. App. Ct. 1977); 373 N.E.2d 21 (Ill. 1978). The more discussed second case is *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1977), *aff'd*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978). See generally: DOWNS, M. A.: *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 N.D.L.R. 629 (1985); KRETZMER: *Freedom of Speech and Racism*, 8 Cardozo L.R. 445 (1987); NEIER, A.: *Defending My Enemy: American Nazis, The Skokie Case and the Risk of Freedom* (1979); DOWNS, M. A.: *Nazis in Skokie* (1985).

whilst not resolving the contradiction between the *Brandenburg* principle and *Feiner,* invalidated ordinances[51] which forbade Nazis to march through a town predominantly inhabited by Jews. Reasoning that the legislation was content-based, since "*any shock effect ... must be attributed to the content of the ideas expressed*",[52] the Court ruled that the trauma caused to Holocaust survivors on seeing Nazis marching in their community could not justify the suppression of the symbolic expression.[53] It was therefore declared that "*[a]lthough there was some evidence that some individuals might have difficulty restraining their reaction to the Nazi demonstration [the Village] does not rely on a fear of responsive violence to justify the ordinance, and does not even suggest that there will be any physical violence if the march is held. This confession takes the case out of the scope of* Brandenburg *and* Feiner. *[It] also eliminates any argument based on the fighting words with a direct tendency to cause violence by the person to whom, individually, the words were addressed.*"[54]

The Court also refused to apply *Beauharnais* in order to uphold the ordinances, and rejected the second of the ordinance on the grounds of content-based restrictions not permitted under the recognised exceptions to the First Amendment.[55] The Court thus rejected the village's argument that the demonstration would inflict psychological trauma on the resident holocaust survivors and other Jewish residents.[56] It asserted that "*[w]here, as here, a crime is made of a silent march, attended only by symbols of and not by extrinsic conduct offensive in itself, we think the words of the Court in* Street v. New York *... are very much on point: '[A]ny shock effect ... must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.*"[57]

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50 578 F.2d 1197 (7th Cir. 1978).

51 According to the first ordinance, applicants for demonstrations had to obtain an enormous amount of insurance. The second ordinance prohibited the dissemination of any materials which "promote and incite hatred against persons by any reason of their race, national origin, or religion, and is intended to do so". The third ordinance prohibited military style demonstrations. 578 F. 2d at 1199–1200.

52 578 F.2d 1197 (7th Cir. 1978).

53 SCHNEIDER: 276.

54 *Supra* n52.

55 *Supra* n52 at 1204–1205.

56 *Id.* at 1205.

57 *Id.* at 1206 [quoting *Street v. New York*, 394 U.S. 576, 592, (1969)]. See also GELLMAN: 339.

Downs observes, however, that *"[had] Beauharnais passed his leaflets out in front of black homes or given them directly to blacks in similar settings-[the Nazis planned to march in the middle of the Jewish town]-the very nature of his speech act would have been transformed from racialist plea into an act of intimidation."*[58]

B. Constitutionally permissible criminalisation of bias speech and the R. A. V. case

At the heart of ethnic intimidation laws lies the fundamental and paradoxical question of how much *intolerance* a liberal democracy should be prepared to tolerate.[59] In searching for a balanced answer to the increasing problem of racism the Anti-Defamation League (ADL) drafted a model bill comprising an institutional vandalism statute and an intimidation statute which enhances penalties for certain criminal offences, when they are committed by reason of the victim's actual or perceived race, sex, colour, religion, sexual orientation, or national origin.[60] The impact of the model was significant: twenty-two states adopted laws resembling the ADL proposal, whilst thirteen other states used different means of addressing the same issue.[61] Thus the past decade has produced a landmark legal criminal response to bias harassment and attack,[62] with thirty one states having such laws at the present, and federal bias crime legislation now also being proposed.[63]

The basic standard which every such law must observe is defined by federal and state constitutional requirements, for even if a law is desirable and effective it cannot stand if it is contradictory to these guiding principles.[64]

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58 DOWNS: *Nazis in Skokie*, 147 (1985).

59 LAWRENCE: 673, 675. For discussion, see BOLLINGER, L. C.: *The Tolerant Society: Freedom of Speech and Extremist Speech in Society* (1968).

60 GELLMAN: 339–340 cites the ADL model bill as *Civil Rights Division, ADL Legal Affairs department, ADL Law report: Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism, and Violent Bigotry* 1 (1988 & Supp. 1990) (hereinafter ADL Law Report).

61 GELLMAN: 340, n31.

62 LAWRENCE: 680.

63 For an extensive list of state bias crime regulations, see LAWRENCE: at 680 and 681, notes 32 and 33. Compare with GRANNIS, E. J.: *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Col. L.R. 178.

64 GELLMAN: 343.

The various state intimidation statutes can be classified, with Lawrence, as a) pure bias crimes; b) penalty enhancement laws. Pure bias crimes are free-standing, separately defined criminal offences, criminalising racially targeted violence; penalty enhancement laws authorise an increased sanction when an already defined crime is committed with racial motivation.[65] The concept of pure bias crimes can be observed in the well publicised St. Paul ordinance,[66] whilst most statutes based on the ADL model work as penalty enhancement statutes.[67]

Grannis uses a different classification: a) statutes which literally enhance penalties for bias motivation, like the Wisconsin or California laws,[68] an approach which has also been taken by a number of other states;[69] b) more commonly utilised are statutes which create a new crime of "ethnic intimida-

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65 LAWRENCE: 682. Gellman works with a different typology: 1. Penalty-enhancement statutes. 2. Penalty-enhancement statutes as well as laws which were created because the legislator decided that the sum of the sanctions for the basic crime and the additional penalty for the bias motive is not sufficient, and thus the legal response must also be different. This includes penalty-enhancement laws and laws describing different behaviour. 3. These laws are not yet reflected in legislation, but would revise the First Amendment exceptions and create more far-reaching laws than currently possible (GELLMAN: 333–334). Because of their logic and functional clarity I will use the Lawrence-typology combined with Grannis's structure.

66 *Infra* p11f and n81.

67 The ADL model statute: *"Intimidation*

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section ... of the Panel Code [insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutorily proscribed criminal conduct].

B. intimidation is a ... misdemeanor/felony [the degree of criminal liability should be made contingent upon the severity of the injury incurred or property lost or damaged]." [ADL Law Report, 4 app. A. (1991)]. Quoted by GELLMAN: 344 and GRANNIS: 181.

68 The Wisconsin law reads in part as follows:

"1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

a) Commits a crime under chs. 939 to 948

b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct. Wis: Stat. Ann. § 939.645 (West Supp. 1992). Quoted by GRANNIS: 180–181.

69 See, e.g. D.C. Code Ann. §§ 22–4001, 22–4003 (Supp. 1992). See GRANNIS: 180 n9.

tion";[70] c) although the approach is similar, many other state statutes do not make reference to other penal code sections; instead, these statutes create new bias offences incorporating existing crimes and additional bias elements;[71] d) finally, some states add the motive of bias to a list of aggravating factors to be considered by the judge in sentencing.[72]

Statutes such as those of Wisconsin or California only punish acts which are already criminal, but add an additional bias element.[73] Statutes which redefine underlying criminal acts usually also punish conducts already criminalised, but extend to additional behaviour which would not be criminal but for the bias motive. The latter may not be considered as penalty enhancement statutes, and therefore, their constitutionality must be appropriately judged.[74]

The constitutionality of these laws presents a highly complex and confused problematic; complex because of the large number of case authority and academic writings,[75] and confused due to a lack of decisive and clear principles outlined therein. The validity of *Chaplinsky*,[76] the most important case, has been undermined by later cases[77] and it has been often suggested that *Chaplinsky* is no longer good law.[78] However, Shiffrin points out that simply because the few "fighting words" cases before the Supreme Court have thus far been overruled, the standing of the *Chaplinsky* doctrine has not been affected-*Chaplinsky* still survives.[79] More recent cases demonstrate that although the Court does not favour prosecution under the "fighting words" doctrine it has avoided an overruling of *Chaplinsky*, by employing vagueness

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70 GRANNIS: 181. See e.g. Iowa Code Ann. § 729.5(3)–(4).

71 See Colo. Rev Stat. § 18–9–121 (Supp. 1992) (*"A person commits ethnic intimidation if, with the intent to intimidate or harass another person because of that person's race [etc....] he (a) Knowingly causes bodily injury to another person."*) Cited by GRANNIS: 182 n14.

72 See C–Cal. Penal Code § 1170. 75 (West Supp. 1992). For further examples, see GRANNIS: 182 n16.

73 GRANNIS: 183.

74 *Id.*

75 See SHIFFRIN: 44–45, note 6 listing recent literature on racist speech.

76 *Supra* p2.

77 *Id.*

78 See, e.g. STROSSEN, N.: *Regulating Racist Speech on Campus: Modest Proposal?*, 1990 Duke L.J. 484, 510. Compare with LAWRENCE, F. M.: *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431. Also NOWAK–ROTUNDA: 1061 and HURDLE: 1154.

79 SHIFFRIN: 49 n22.

and overbreadth standards in order to quash convictions under different expression-limiting statutes.[80]

Two Supreme Court decisions have scrutinised the global issue of bias laws and several state Supreme Court decisions provide a rich sample of perceptions of class speech statutes.

In the first of these cases, *R.A.V. v. United States*,[81] a group of teenagers burned a cross within the fenced portion of the yard of a black family living in a white neighbourhood. This act took place in June 1990, in the town of St. Paul. R.A.V., one of the perpetrators, was prosecuted under a hate speech ordinance,[82] which was later challenged by him on First Amendment grounds. The Minnesota Supreme Court rejected the challenge,[83] but the U.S. Supreme Court granted certiorari and reversed the State Supreme Court's ruling, unanimously declaring the ordinance unconstitutional under the First Amendment.[84]

Justice Scalia delivered the majority opinion, writing for five justices.[85] They accepted the State Court's interpretation of the ordinance that only "fighting words" are punishable under it.[86]

We can here agree with professor Shiffrin that the St. Paul ordinance met most of the conditions for becoming an overbreadth statute.[87] The Minnesota

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80 See *Gooding* v. *Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972) and *Lewis v. City of New Orleans*, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed2d. 214 (1974).

81 112 S.Ct. 2538, 120 L.Ed. 2d 305(1992).

82 *"Whoever places on public or private property a symbol, object appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."*

112 S.Ct. at 2541, 120 L–E.d.2d at 315 [citing Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02. (1990)].

83 *In re. Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991), revd 112 S. Ct. 2538 (1992).

84 112 S.Ct. 2538, 120 L.Ed. 2d 305(1992).

85 Chief Justice Rehnquist, Kennedy, Thomas, and Souter JJ. joined him.

86 112 S.Ct. at 2541–2542, 120 L.Ed. 2d at 315–316.

87 SHIFFRIN: 70. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), Brennan J. in his dissenting opinion asserted that the obscenity statute was unconstitutionally vague. The doctrines of "vagueness" and "overbreadth" are part of First Amendment jurisprudence and are usually closely related. In short, a statute may be regarded as vague if it does not fairly inform a person that what is commanded or prohibited is unconstitutional because it violates due process. The doctrine originates from the due process clause of the Fourteenth Amendment (Black's Law Dictionary, 1103, 1549).

Supreme Court, however, constructed it in such a way that it became restricted to "fighting words" under the *Chaplinsky* standard. The Minnesota Court held that "*Unlike* ... Texas v. Johnson *the challenged St Paul ordinance does not assume that any cross burning ... is subject to prosecution; rather, the ordinance censors only those displays that one knows or should know will cause anger, alarm or resentment based on racial, ethnic, gender or religious bias... [T]his court narrowly construed Minn. Stat. § 609.72, subd. 1(3) (1990) ... to refer only to 'fighting' words ... thereby preserving it in the face of an overbreadth attack. Similarly limited to expressive conduct that amounts to 'fighting words'-conduct that itself inflicts injury or tends to incite immediate violence ... the ordinance in question withstands constitutional challenge.*"[88]

Thus whilst the U. S. Supreme Court accepted this interpretation of the doctrine, Justice Scalia expressed the opinion that the principal defect of the ordinance was that it discriminated on the basis of subject matter. It was thus held to be "facially unconstitutional",[89] since displays containing abusive invective, no matter how severe, are permissible under this ordinance, unless they concern one of the specified topics. Therefore those who use "fighting words" in connection with, for example, homosexuality or HIV patients, are not covered by this ordinance. "*The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavoured subjects.*"[90]

The majority opinion stated that "fighting words" are outside First Amendment protection, because they are "non-speech", unworthy of protection; yet the content of "fighting words" is safeguarded under the Constitution.[91] Unlike a time, place, or manner restriction, the St. Paul ordinance regulated particular "fighting words" based on the *content of the expression.* Justice Scalia acknowledged that the First Amendment does not place an absolute prohibition on content discrimination.[92] He enumerated four exceptions in which content discrimination can be constitutional:[93]

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88 *In re. Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991).

89 112 S.Ct. at 2542, 120 L.Ed. 2d at 314.

90 112 S.Ct. at 2546, 120 L.Ed. 2d at 323.

91 *Id.* at 2545, 320–321.

92 *Id.* at 2545, 320–321

93 Shiffrin, S. H. defines them as a) entire class of speech is proscribed, b) secondary effects, c) incidental effects, d) catch-all category (SHIFFRIN: 51–56). Compare also with LAWRENCE: 687.

1. If the discrimination is based on the same reason under which an entire category of speech is excluded from First Amendment protection.[94]

2. In cases of the "secondary effect" principle the government may treat content-defined subclasses differently, if the government is concerned not with the offensiveness of the content, but with certain "secondary effects" associated with a particular content.[95] The "R.A.V." Court held that the "secondary effect" doctrine, as well as the first exception, did not apply to the St. Paul ordinance.[96]

3. The Court asserted that content-based sub-classes of unprotected speech can be regulated if the expression is included incidentally within the scope of the law aimed at conduct rather than speech.[97]

4. Finally, the Court created a general exception for a selective regulation of unprotected speech, if the regulation reflects that no governmental suppression of ideas is involved.[98]

The Court also gave an indication of what sort of statute would be acceptable as constitutional: It had to 1. reflect a compelling governmental interest; 2. the content discriminatory nature would have to be necessary to serve that interest.[99]

Whilst Justice Scalia recognised that helping to safeguard the basic human rights of groups historically subject to discrimination was a compelling state interest,[100] the Court stated that content discrimination was not the only way, and therefore not the necessary way, in which to act according to this interest. Meeting the "compelling state interest" test was not enough for the ordinance, Justice Scalia also argued, because the danger of censorship presented by a facially content-based statute required that such censorship be shown to be

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94 112 S.Ct. at 2545, 120 L.Ed. 2d 320–321.

95 *Id.* at 2546, 322. See also HURDLE: 1158–59. The court referred to *Renton v. Playtime Theatres Inc.*, 475 U.S. 41 (1986), in which Renton upheld an ordinance that zoned adult bookstores and theatres differently than it did other bookstores and theatres. (*Id.* at 44). The city defended its decision, asserting that it did not pass the ordinance primarily out of concern for the content of the films, but rather considering "secondary effects" such as the deterioration of the neighbourhoods, etc. As a consequence, the Court did not classify the ordinance as being content-based (*id.* at 47–50).

96 112 S.Ct. at 2549, 120 L.Ed. 2d 325.

97 *Id.* at 2546, 322. Compare with HURDLE: 1161.

98 *Id.* at 2547, 322. Compare with HURDLE: 1162.

99 *Id.* at 2549–2550, 325–326. Compare with HURDLE: 1162.

100 *Id.* at 2549, 325.

necessary in order to serve this compelling end.[101] This latter was not the case according to the Court, and thus the ordinance failed because without it there were enough content-neutral remedies available.[102] A content-neutral ordinance proscribing all "fighting words" would have withstood constitutional challenge.[103]

Justice White wrote a concurring opinion on behalf of three other justices.[104] Shiffrin, in his critique of the decision, vents his opinion that Justice White made an inexplicable mistake in viewing the St. Paul ordinance as constitutionally overbroad.[105] Justice White observed in *R.A.V.* that the Minnesota Court did not clearly identify the possible injuries that might be inflicted by expressions St. Paul sought to regulate.[106] As Shiffrin observes, lurking in such an approach is the danger that lower courts may then try to define a required degree of injury.[107] In his opinion Justice White suggests that a less stringent degree of injury, as required in tort for intentional infliction of emotional distress, might already suffice for criminal liability.[108] Shiffrin therefore concludes that injury should not be a sufficient or necessary condition for criminal liability.[109]

It is true that in Justice White's interpretation the "fighting word" doctrine applies to "*direct personal insults or an invitation to exchange fisticuffs*".[110] However, he also proposed a completely different construction of "fighting words": they are not protected because the content of the speech does not contribute to the "marketplace of ideas".[111] In his view "fighting words" comprise purely insulting language addressed directly to another person, speech which incites the addressee to fight, thus being worthless and of no value for society.[112] Such an interpretation of the doctrine concurs also with *Cohen*,

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101 *Id.* at 2549, 325.
102 *Id.* at 2550, 326.
103 *Id.* at 2550, 326.
104 *Id.* at 2551, 327. O'Connor, Blackmun, and Stevens JJ joined him.
105 SHIFFRIN: 70.
106 112 S.Ct. at 2559, White J. concurring.
107 See SHIFFRIN: 77.
108 *Id.*
109 SHIFFRIN: 78.
110 112 S.Ct. at 2553 n4, White J. concurring, quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989).
111 *Id.* at 2551–2552.
112 *Id.* at 2553.

and *Gooding*[113] making "fighting words" unprotected because inter-personal insults add nothing to the market place.[114] Nevertheless, the majority opinion did not take this widely criticised direction.[115]

C. The tide of Mitchell and Wyant

Two federal court decisions striking down hate speech codes at the Universities of Michigan and Wisconsin for overbreadth[116] and additionally the *R.A.V.* case seemed to paralyse the movement of criminal as well as institutional (university) response to hate speech.[117] However, a more recent decision affirmed sentencing enhancement for racially motivated crimes.[118]

The consideration of *R.A.V.* by the United States Supreme Court in 1992 was the first occasion on which the constitutionality of a modern bias crime law was dealt with. A few months after this, the highest courts of Wisconsin and Ohio handed down decisions in similar cases.[119] In *State v. Mitchell* the Wisconsin Supreme Court struck down a penalty-enhancement law which increased the punishment for certain crimes if committed with biased intention.[120] In *State v. Wyant*[121] the Ohio Supreme Court held a state ethnic intimidation statute to be unconstitutional.[122] In both cases the Courts stated that, whilst the bias crime laws under scrutiny were understandable and noble in purpose, they still violated First Amendment freedoms.[123]

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113 For *Cohen*, see *supra* nn20, 35; for *Gooding*, *supra* n80.

114 HURDLE: 1172.

115 See SHIFFRIN: 70–84; HURDLE: 1172–1173.

116 See *Doe v. University of Michigen*, 721 F. Supp. 852 (E.D. Mich. 1989); *U.M.W. Post, Inc. v. Board of Regents of Univ. Wisconsin*, 774 F. Supp. 1163 (e.d. Wis. 1991).

117 See for discussion DELGADO, R.: *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L.R. 343 (1991); STROSSEN, N.: *Regulating Free Speech on Campus: a Modest Proposal?*, 1990; Duke, L. J. 484, 571.

118 *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993). Following two Canadian Supreme Court decisions *R. v. Butler*, 89 D.L.R.4th (Can.) 449 (1992); and *R. v. Keegstra*, 3 S.C.R. (Can.) 697 (1990). See DELGADO, R.–YUN, D.: *The NeoConservative Case Against Hate-Speech Regulation–Lively, D'Souza, Gates, and the Toughlove Crowd*, 47 Vand. L.R. 1807 (1994).

119 *Wisconsin v. Mitchell*, 485 N.W. 2d 807 (Wis. 1992); *Ohio v. Wyant*, 597 N. E. 2d 450 (Ohio 1992).

120 See the statute *supra* n68.

121 *Ohio v. Wyant*, 597 N. E. 2d 450 (Ohio).

122 LAWRENCE: 673–674. See the statute *infra* n138.

123 *Id.* at 676.

In *Mitchell* the defendant-Mitchell-was one of the a group of black youths who decided to assault whites. They beat a white teenager unconscious, leaving him with permanent brain damage. Mitchell was convicted and sentenced to four years instead of two because the selection of the victim was biased.

The Wisconsin Supreme Court then held that the state's penalty-enhancement statute had violated the First Amendment.[124] The Court found firstly that the statute punished thought because it punished the perpetrator for his "motive".[125] Although it agreed that criminal statutes may require *mens rea*, the Court drew a distinction between motive, intent, and purpose, and concluded that only the latter two are punishable.[126] Secondly, the Court reasoned that because speech will often be used to prove an element of bias, statutory regulation would "chill" speech.[127] This means that speech could be "self-censored" for fear of civil or criminal liability. The court further stated that the penalty-enhancement law "*punishes the defendant's biased thought ... and thus encroaches upon First Amendment rights.*"[128] Therefore the punishment of bigoted criminals because they were bigoted was, in the Court's view, enhanced by the hate-crime statute.[129] The majority opinion, delivered by Chief Justice Hefferman also held that the process of selecting the victim was not a "conduct" but an intellectual exercise, and so part of the defendant's "intent".[130]

Justice Abramson, dissenting, saw the statute as a restraint on conduct and not on belief. According to her interpretation the law required the State to show the close connection between the selection of the victim and the underlying crime.[131] Justice Bablitch in his dissent stated that the disputed law was simply a law against discrimination, that is, discrimination in the selection of the victim of the crime.[132] The United States Supreme Court granted certiorari, and in a unanimous judgement delivered by Chief Justice Rehnquist

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124 *Mitchell*, 485 N.W.2d 807.
125 GRANNIS: 186.
126 *Mitchell*, 485 N.W.2d at 812.
127 *Id.* at 815–817.
128 *Id.* at 812.
129 *Id.* at 814.
130 *Id.* at 815.
131 *Id.* at 818.
132 *Id.* at 819.

reversed the decision of the Wisconsin Supreme Court and upheld the constitutionality of the penalty-enhancement statute.[133]

This decision meant that the victim selection process was now accepted as *conduct* rather than *speech*. However, the core issue was that of the problem of *motive*. Here the Court distinguished between *motive* and *abstract belief*.[134] It stated that judges had traditionally been allowed to take several factors into consideration in deciding how severe should be the punishment for a particular offence. Motive is one such factor which could aggravate the offence. The opinion also noted, however, that such a discretion cannot be stretched to encompass abstract beliefs.[135]

Chief Justice Rehnquist recalled Bablitch's dissent, stressing that the Wisconsin statute is similar to anti-discrimination laws, with equally unquestionable constitutionality. It thus fits into the category of *content natural regulation*.[136]

A law similar to that of Wisconsin was declared unconstitutional by the Ohio Supreme Court in *State v. Wyant*.[137] The case concerned a dispute in which the defendant uttered these phrases: "*we didn't have this problem until those niggers moved in next to us...*" "*I ought to shoot that black mother fucker ...*" The defendant was found guilty of ethnic intimidation based on the predicate offence of aggravated menacing,[138] but the Court invalidated the statute, reasoning (as did the Wisconsin Court) that punishing motives is equivalent to thought control, and therefore this statute punished thought.[139]

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133 *Mitchell*, 124 L.Ed. 2d 436 (1993).

134 *Id.* at 445.

135 *Id.* at 445–446.

136 *Id.* at 446.

137 597 N.E.2d 450 (Ohio 1992).

138 GRANNIS: 187, n50 also cites the Ohio staute:

"Ohio Rev. Code Ann. § 2927.12 (Baldwin 1992):

(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A) (3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offence of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

139 *Ohio v. Wyant* at 454.

D. Elements of unconstitutionality?

Numerous scholars have expressed the opinion that racist speech is unprotected by the First Amendment.[140] Countering this, Gellman for example argues that racist speech restrictions and bias crimes are both unconstitutional interference with free speech[141] These academic theories might be best described as extremist viewpoints, inevitably failing to give usable guidance.

In seeking to find an answer to the constitutionality issue several authors have experimented with a distinction between bias crimes and racist speech, associated with the opposing pair of "conduct" and "strictly expression" respectively.[142] However, the problem with such an approach—as F. M. Lawrence analyses at length[143]—is that it is hard to define in a particular case whether certain behaviour qualifies only as conduct, or only as expression, or as both.[144] It is the *animus* of the actor which makes expression out of mere conduct.

Consequently, in my view, it is the *mens rea* element which plays a crucial role in defining the constitutionality of a given collection of words or deeds, and therefore the constitutionality or unconstitutionality of the law which seeks to proscribe such.

Firstly the "motive" has, therefore, to be scrutinised, as the prerequisite of intentional criminal behaviour; and secondly, the *mens rea* of these.

1. The problem of motive

Lying at the core of the constitutionality problem in statutes punishing bias-crime, and thus hate-speech, is the question of motive. Amongst several other

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140 LAWRENCE makes this observation at 677. See for comparison DELGADO, R.: *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L.: R. 133 (1982); MATSUDA, M.: *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L.R. 2320 (1989); LAWRENCE, C. R.: III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431.

141 GELLMAN: 333.

142 See WINER, S.: *The R.A.V. Case and the Distinction Between Hate Speech Laws and Hate Crime Laws*, 18 Wm. MITCHELL: 971 (1992).

143 LAWRENCE: 691–694.

144 It is extremely difficult to distinguish between conduct and speech. Emerson looked for the predominant character in the behaviour to establish such a distinction. See also ELY: 1495. LAWRENCE at 694 says that "[b]urning a Draft Card ... is an undifferentiated whole, hundred percent action and hundred percent expression." Such a conduct is extremely similar to the conduct of cross burning.

constitutional concerns, the ADL model statute also raises this problem.[145] In defining the mental state of the actor this model statute only says that one must commit the crime "*by reason of ethnicity*".[146]

It is often maintained that by distinguishing pure bias crimes from penalty-enhancement statutes it is possible to differentiate between constitutional and unconstitutional laws.[147] Here the argument runs that enhancement laws are constitutional, because the bias motive is only a factor in sentencing and not an element of the crime.[148]

Thus the problem of whether statutes which enhance the penalty of an already defined criminal offence are in breach of the Fourteenth or First Amendment still remains.[149] In the words of Gellman, "*a reoccurring first amendment concern is the danger that ethnic intimidation statutes directed towards motive criminalization penalize pure thought and opinion*".[150] She is, therefore, impelled to ask: "*Can the government constitutionally punish motive?*"[151] This approach to the question of constitutionality has been echoed in *Mitchell* and *Wyant*,[152] which rely heavily on Gellman's article.[153]

Gellman continues by proposing that "motive", "intent" and "purpose" are related concepts, since they refer to the thought process which precedes the

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145 GELLMAN: 355. For example, it fails to define a culpable mental state. Usually jurisdictions define a basic level of culpability. The Model Penal Code in Section 2.02 (3) states that recklessness will satisfy culpability requirements if the offence itself does not specify.

146 GELLMAN: 357.

147 Lawrence quotes the testimony before the House of Representatives, Subcommittee on Crime and Criminal Justice in support of the Hate Crimes Sentencing Enhancement Act of 1992 (H.R. 4797, 102d Cong., 2d Sess. 1991).

148 *Id.*

149 This question of overbreadth was thoroughly discussed in *Thornhill v. Alabama*, (310 U.S. 88, 97 (1940)) where the Court stated that, "[a] law is void on its face if it 'does not aim specifically at evils within the allowable area of [government] control, but ... sweeps within its ambit other activities' that constitute an exercise of protected". See also *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

150 GELLMAN: 362. In *Texas v. Johnson* the Court, however, expressed the idea: that the "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (491 U.S. 397, 414 (1989)).

151 GELLMAN: 363.

152 *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992); *State v. Wyant*, 597 N.E.2d 450 (Ohio 1992).

153 GRANNIS: 189.

commission of the crime. However, they are *legally* distinct in crucial respects.[154] Motive is a "*cause or reason that moves the will and induces action. An idea, belief or emotion that impels or incites one to act in accordance with his state of mind or emotion.*"[155] Thus motive is the term employed for the actor's underlying, propelling force for acting, whilst "purpose" is "*[t]hat which one sets before him to accomplish or attain; an end, intention, or aim, object, plan, project. Term is synonymous with ends sought, an object to be attained, an intention, etc.*"[156] Purpose, therefore, connotes what the actor plans as a result of the conduct, leaving "intent" to refer to the actor's mental state as it determines culpability or volition.[157]

Gellman acknowledges that some crimes are distinguished from others on the basis of the actor's purpose. She maintains, however, that even, should the actor's purpose be at issue, this does not permit a transference of this scheme into a punishment for motive.[158] She concludes that unlike purpose or intent, motive cannot be an element of the criminal offence.[159] As an example she points to the Model Penal Code, which illustratively focuses in its definition of theft on purpose, but not on motive.[160] She also refers also to federal civil rights laws, which reflect well a solution by which racial or other similar *animus* is not necessary for liability.[161] Conclusively for her argument, this distinction between *why* and *what* is fundamental in criminal law.

Grannis and F. M. Lawrence have also developed two distinct, but nevertheless connected, theories in refuting the *Gellman-doctrine*. According to Grannis the two state Supreme Court decisions-having been founded on the *Gellman-doctrine*[162]—were based on an incorrect distinction between "motive" and "intent".[163] The basic arguments of these decisions can be summarised by

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154 GELLMAN: 364.

155 GELLMAN at 364 quotes from *Black's Law Dictionary* (6th ed. 1990, St. Paul, West Publishing Co.) at 1014.

156 *Black's*, 1236.

157 GELLMAN at 364, quoting LaFAVE, W.—SCOTT, A.: *Criminal Law* § 3.6 at 227 (2nd ed. 1986).

158 *Id.* at 366.

159 *Id.* at 364.

160 MPC §§ 223.2, 223.5 (1962) in SINGER, R. G.—GARDNER, M. R.: *Crimes and Punishment: Cases, Materials and Readings in Criminal Law* (New York 1989) App. 68–69.

161 GELLMAN at 368 refers to Title VII, Civil Rights Act, 1964 42 U.S.C. § 2000e–2 (1988).

162 GRANNIS: 189.

163 GRANNIS: 188.

saying that the treatment of the state of mind in the penalty-enhancement statutes is contrary to principles of criminal law and thus amounts to punishment of thought, which is in violation of the First Amendment. As the intention of committing the crime is already punished in the predicate statute[164] the penalty-enhancement law therefore punishes the motive of such intent.[165]

It is true, as Grannis points out, that this argument is partly based on a mistaken distinction between "intention" and "motive". However, LaFave and Scott—invoked by Gellman to give weight to this differentiation[166]—make it clear that the *why* can be crucial in determining whether a given crime was committed.[167]

There is also a second argument why penalty-enhancement statutes punish thought. To explain this let us use an example: should a certain person assault a black for reasons of revenge, and another commit an assault simply because of the ethnicity of the victim, both offenders will have committed the same act but the bigoted one will be punished more severely merely because of his thought.[168]

Whether a person is guilty of a crime depends on whether he has the requisite state of mind with regard to all the material elements of said crime.[169] Therefore, to be guilty under a penalty-enhancement statute one must have acted with purpose, with regard to the attendant circumstances[170] of the victim's racial identity. And it is, indeed, long established practice that the trial judge may take into account the elements of racial hatred in sentencing.[171]

There is, of course, a difference between considering racial motive in sentencing; making it enhance the penalty; or defining it as an element of a crime; nevertheless, there is no reason to distinguish between these for First

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164 *Mitchell* at 812; GELLMAN: 363.

165 GELLMAN: 364.

166 *Supra* 59 and n329.

167 LAFAVE–SCOTT: *Criminal Law*, § 3.6, at 227–28 (2nd ed. 1986) cited by GRANNIS at 190.

168 GRANNIS: 191. Compare *Mitchell* at 813–814.

169 Compare GRANNIS at 192 with MPC § 2.02 (4).

170 In the terminology of the Model Penal Code, the racial identity of the victim is an "attendent circumstance of the crime" [MPC § 1.13(9)].

171 In *Barclay v. Florida*, 463 U.S. 939, 949 (1983) the Supreme Court held that the Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in the murder.

Amendment purposes![172] In fact the precise reason for First Amendment protection would be lost if it was possible to circumvent it by albeit important technicalities.[173] It is irrelevant whether somebody is punished more severely for his bias motive because the *statute* says so or because *case law* allows the consideration of such as an aggravating factor. In both instances the offender has been exposed to additional hardship because of his bias—and if this is in contradiction with the First Amendment, then it is equally so for all.

2. The mens rea of bias speech

Whilst trying to distinguish permissible and unconstitutional restriction on expression under the First Amendment, F. M. Lawrence differentiates between the *mens rea* of bias crime and racist speech.[174] He defines a bias crime as being an offence in which, even without the actor's racial motivation, his act is proscribed and constitutes another offence. In the case of racial speech, however, the same speech would not be criminal if it lacked the racial motivation and content.[175]

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172 As TRIBE stated: "Enhancing a criminal sentence for any hate crime ... in no way creates 'thought crime' or penalises anyone's conduct based upon a non-proscribable viewpoint ... the trigger for enahanced punishment laws differs completely from the constitutionally problematic trigger for punishment under the St Paul ordinance..." (H.R. 4797, 102d Cong., 2d Sess. 1991, 11–12). As Lawrence points out, the problem with this viewpoint is that almost every civil rights crime contains within it a "parallel" crime against person or property. Also, whereas a bias motivation will always increase the sentence, in cases of penalty-enhancement statutes a pure bias crime might provide - theoretically - a lesser sentence than the parallel crime, making the argument for unconstitutionality ridiculous (LAWRENCE: 696–697, n98).

173 The claim that motives do not typically bear on criminal liability is a technical point about the way offences are usually defined. It is true, however, that there is also a deeper point suggested by the claim that the actor's ultimate purpose does not bear on his or her culpability for the criminal conduct. See FLETCHER, G.: *Rethinking Criminal Law* (1978) 452 and 453. For a general discussion of intent, see HART, H. L. A.: *Punishment and Responsibility: Essays in the Philosophy of Law,* Chapter 5, 113–135. Note that the German law on homicide, for example, considers motive to be an aggravating factor [StGB § 212(2)], as does Hungarian criminal law [Penal Code § 166 (2) b)].

174 LAWRENCE: 698.

175 *Id.* Lawrence observes, in connection with the harm side of the crime, that racially motivated assault, in addition to the general harm attributed to assault, also causes psychological harm, as well as endangering the relationship between the different classes and thus endangering or harming public peace (LAWRENCE: 698).

From the viewpoint of punishment, criminal liability is linked to the actor's mental state.[176] To establish a crime as biased, therefore, the prosecution has to prove two different elements on the *mens rea* side. Firstly, the *mens rea* of the parallel or basic crime;[177] and secondly, the bias motivation.[178]

In bias speech, however, the first element of *mens rea* is not punishable, since it is only a wish to express oneself. The problem, however, is that this observation developed by Lawrence, whilst valid and extremely useful in cases such as *Mitchell*, does not prove helpful when Robert Victoria burns a cross on the lawn of a black family. In the latter case, whilst the trespass and vandalism-the parallel crimes-are undoubtedly not protected by the First Amendment, the Lawrence-type analysis asserts that Ely's 100% expression[179] also lies outside the constitutional shield.[180]

Thus Lawrence establishes that when a cross is burned on the lawn of a black family in order to terrorise them this becomes not racist speech, but a bias crime. Such a scrutiny could lead to a "*new understanding of fighting words*",[181] for whilst bias crimes do not enjoy First Amendment protection, racist speech does. Thus by properly defining when a conduct qualifies as a bias crime clearer answers may be given in the quest to establish whether constitutional protection exists.

E. Is there a new understanding?

In "fighting words" and especially bias speech cases problems arise due to the lack of a coherent doctrine. By re-interpreting *Chaplinsky* over and over again

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176 Compare with HART: 26–27.

177 *Id.* at 699.

178 *Id.* at 700.

179 ELY, J. H.: *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. R. 1481 at 1495 (1975).

180 The Lawrence-analysis as applied to *Wyant* can be laid out as follows: if Wyant intended his abusive language to create fear in White and McGowan, or if Wyant knew that his language would do so, he created a parallel crime of verbal assault. Accordingly, if he did so with a racial motivation, he committed a bias crime, rather than racist speech. If, on the other hand, Wyant lacked the requisite for the first element of the *mens rea*, the intent for verbal assault, then he only expressed a racist message (*id.* at 705). The first conduct is not protected under the Constitution, whilst the latter speech should be.

181 *Id.* at 706.

the Supreme Court has stripped the "fighting words" exception of its functional validity.[182]

Nevertheless, the "fighting words" doctrine still remains one which could be put to use in dealing with bias speech and the question of the constitutionality of its criminalisation. Several problems arise, however, when "fighting words" is understood to mean those *which are likely to incite violence by the addressee.* This inevitably provides a licence for hecklers,[183] and thus this interpretation of "fighting words" protects those who need it least. As Shiffrin observes, citing Shea, there is something deeply anomalous about a test which permits the legislator to punish a speaker insulting "a burly construction worker" who would undoubtedly retaliate, whilst forbidding the punishment "*of the reviler of a wheelchair-bound quadriplegic*".[184] The arguments in *Collins*[185] for refusing the ban on the Nazi march are basically similar. Shiffrin, however, also remarks that introducing the reasonable or average person into the system would not compensate for the test's disabilities.[186] A further limitation of the *Chaplinsky* doctrine is (as developed in the subsequent case law[187]) that it only applies either to direct personal insults or to the imminent possibility of violence.

"*Racially targeted actions that are intended to create fear in the addressee and that in fact do so may be constitutionally treated as bias crime whether the behaviour is primarily by the use of words or by physical act. Racially targeted behaviour that vents the actor's racism is racial speech that is protected by the First Amendment, even if it disturbs or insults the observer greatly.*"[188] If such a narrow definition of the "fighting" words doctrine is accepted, bigotry appears to be a protected class of expression, making the creation of a new class of

182 *Id.* at 707.

183 This argument was rejected in *Terminiello* (*supra* p7 and n44). Compare with *Garner v. United States*, 368 U.S.157 (1961), holding that the state could not prohibit sit-ins solely because other citizens would become angry and possibly violent. Compare also with *Edwards v. South Carolina*, 372 U.S.299 (1963), holding that the state could not order dispersal of civil rights demonstrations because of the presence of troublemakers.

184 SHIFFRIN at 80, n194 quoting SHEA, T. F.: *Don't Bother to Smile When You Call Me That-Fighting Words and the First Amendment*, 63 Ky L.J. 1, 2 (1975).

185 *Id.* at 80.

186 *Id.*

187 See *supra* p2f.

188 LAWRENCE: 711.

unprotected hate speech a widely urged and necessary option.[189] For, as the Supreme Court has put it, "*the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered*".[190]

The other angle from which this problem may be approached is by looking at the constitutionality of the bias expression statutes through the *O'Brien* doctrine. Since ethnic intimidation statutes cover conduct *additional* to speech their constitutionality might be upheld under this doctrine.[191] However, in *Texas v. Johnson*[192] the Court asserted that if the governmental interest is related to the suppression of expression the *O'Brien* standards are not applicable.

One might say that racist speech seems to have minimal marketplace value, which has to be balanced against the harm it causes.[193] Yet it can also be argued that a restriction on "fighting words" cannot have within its remit the prohibition of distasteful insults based on race, gender, or religion, or any other type of bigotry. Instead, a law proscribing this type of speech would have to outlaw the entire category of "fighting words".[194] The content contributes to the discovery of truth through the marketplace of ideas, and may not be repressed by majority preferences.[195]

Looking at the *R.A.V.* case, one should note that it does not provide a basis for invalidating penalty-enhancement statutes, for it applies a doctrine which is only applicable to laws facially discriminating between acts on the grounds of their expressive content.[196] It follows that whilst the government can regulate certain content-based categories of speech, such as obscenity, the statutes which do so are invalid if they in fact distinguish on the basis of content.[197] Therefore laws may regulate "fighting words" by making only one content distinction-that between "fighting words" and "non-fighting words".

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189 *Doe v. University of Mich.*, 721 F. Supp. 852, 862 (E.D. Mich. 1989), suggests, however, that bias expressions may provoke retaliation. This appears to be the exception, rather than the rule.

190 *N.A.A.C.P. v. Button*, 371 U.S. 415, 444–45 (1963).

191 GELLMAN: 376.

192 *Texas v. Johnson*, at 403.

193 See DELGADO, R.: *Words that Wound* at 144–46, and 179.

194 HURDLE: 1171.

195 See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes J. dissenting).

196 GRANNIS: 179.

197 *R. A. V.*, at 2545–2546.

Such a facially content-neutral statute could be a typical penalty-enhancement statute, which punishes for example crimes committed "*against a person or a person's property because of such person's race (etc.)*". Even though such a law would at face address the defendant's motive for committing the crime,[198] this would not destroy its constitutionality. Such a statute should then be subjected to the *O'Brien* test, to scrutinise whether it unduly reaches expressive conducts.[199]

Laws of the type outlined would be constitutional, because they advance interests unrelated to the suppression of speech. Nevertheless, the application of penalty-enhancement statutes should still be carried out so as to minimise the restriction on freedom of expression.

However, concluding that a law meets the requirements of the *O'Brien* test does not say anything as regards its relation to the second prong of the *Chaplinsky* doctrine-namely, the question of proportionality. Or, when is the restriction not greater than that essentially necessary for the furtherance of the government interest?[200]

According to the second type of speech described by *Chaplinsky*, words which tend to incite an immediate breach of peace do not receive constitutional protection.[201] Thus a long-standing, unjustified, and paradoxical theory and practice was reflected in the "fighting words" cases, which looked at the *target* of the expression for a *violent response*.[202] Of course such a test gives more protection to a drunken white pub fighter than to a pregnant HIV-positive lesbian black Jew in a wheelchair! Not to mention that such an analysis makes possible the prohibition of speech in order to prevent the violence of hecklers. Surely it would be more justified and useful to look at the other side – that is, *whether the expression is likely to incite to violence AGAINST the target(s) of the bias expression.*

If the standard of bias-word criminalisation could therefore be defined, heeding these basic premises, by postulating a mere definition of *violence*, we could then slot the second condition of the *Chaplinsky* doctrine into the *O'Brien* test. This would be the line drawn to determine when expression becomes unconstitutional and loses First Amendment protection.

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198 GRANNIS: 215.

199 *Id.* at 216.

200 Compare with the fourth prong of the *O'Brien* doctrine. See *supra* p4.

201 See for discussion 38–40.

202 See, for example, *Collin v. Smith*, *supra* n49.

In order to construct this model it is crucial that we define "violence". It is suggested here that it should be accepted as meaning *the intentional commission of criminal offences.* Incitement to violence would therefore mean the instigation to the commission of a crime. Thus the *Chaplinsky* test would cover, for example, cross-burning (which, making use of Lawrence's analysis, is comprised of several offences creating a bias crime) only if somebody else apart from the perpetrator would be motivated by this act to commit a crime. However, a difficulty with this model quickly becomes apparent: unwitnessed deeds qualify differently from those which are committed in the midst of a lynch-mob.

The other problem with such a model is whether incitement to violence should be covered by the intention of the perpetrator, thus making it a bias crime. Should a speech, for instance, denouncing Jews be required to be perpetrated with the intention of instigating violence against the targets? Additionally, if an objective test was to be introduced, what or who could serve as the standard for the level of instigation necessary? The application of the modified "general test of a reasonable man" (that a reasonable man would be incited to commit a crime), expresses within itself all the ridiculous characteristics of the situation.

A solution to this paradox is thus required, and it is put forward that the test should be amended by using the actual offender to set the standard. Thus *the speech incites to violence if the speaker himself would be motivated to violence by the speech; if his intention was to motivate to violence; or his speech triggered violence against the target(s) of the expression.*

In cases of bias crimes, which as Lawrence observes are built on a basic crime and a bias motive,[203] there is no need to prove any existence of incitement, since the very commission of such an offence satisfies the test: The bias motive triggered the *mens rea* of a "common" crime, the *actus reus* of which was also committed. However, if the act is plain bias speech, it is for the jury to decide whether the certain words used would incite the defendant who uttered them to a violent reaction.

The other parts of this model speak for themselves. Unfortunately American hate speech law—despite its sophisticated case law theory—does not present an answer to the problems which were identified above, and unless the Supreme Court presents a *black letter rule* judgement in this matter there will be no light at the end of the tunnel in bias speech cases.

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203 LAWRENCE: nn344, 352.

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European Community Criminal Law

I. Introduction

Criminal law and criminal procedure are regarded as parts of the Member States' national sovereignty. Hence, the relationship between European Community law and national criminal law has been characterised throughout several decades by mutual disinterest. The general opinion was that since Member States did not transfer expressly sovereign rights in the field of criminal justice on the institutions of the Community, the latter cannot have its own system of criminal law. During these years international agreements, which were concluded under the auspices of the Council of Europe and concerned mutual assistance in criminal matters, constituted the decisive form of co-operation. These agreements, however, were not limited to the Member States of the Community.

The era of disinterest ended with the establishment of the internal market and the opening of the Eastern European countries. The latter resulted in changed developments of crime. New main focuses of economic crime marked a development that with the facilitation of mobility and the lack of border controls in the internal market, more and more affected the European citizens. In some fields, organised transborder crime can already be clearly perceived, in particular in drug trafficking, terrorism, subsidy fraud, car theft, and large scale prostitution. Criminal law and policy and criminal prosecution had to, therefore, increase their efforts to take this development into account.

Legal scholarship uses the term *European Community Criminal Law* differently.[1] This could lead to misunderstandings as to whether and to what extent there exists a criminal law valid for all Member States of the European Union. The aim of this paper is to examine the possibility of a supranational criminal law. Firstly, the legal character of sanctions imposed by the Commission shall be considered. This involves a brief analises of the relationship between criminal law and administrative criminal law. It is followed by an outline of existing forms of co-operation in criminal justice. The system of intergovernmental co-operation provided in Title VI of the recently modified Treaty Establishing the European Union will be closely examined with a special emphasis on the possibilities of transfer of sovereignty on the Community institutions as regards criminal matters. Finally, the emergence of supranational criminal law shall be considered in relation to the alternative means for protecting Community interests. The intention is to show when and under what conditions harmonisation or unification is desirable.

II. The concept of criminal law and that of supranationality

As regards criminal law, all Member States have identified within their domestic legal systems an area that is labelled criminal law. The qualification of law as criminal law implies that designated public actors are allowed, or sometimes required, to meet certain conduct with specific procedures and sanctions prescribed by law. The sanctioning authority designated by law usually belongs to an independent judiciary. The kind of conduct subject to such a public response is also determined by law, even if the legislature might have delegated such determinations to other actors exercising public authority. The designation of conduct subject to criminal procedures, the specification of the procedures themselves, the determination of sanctions in given cases and their manner of enforcement—all are closely interrelated from one country to another or from one jurisdiction to another.[2] Moreover, according to the legal systems of the Member States petty offences are usually regarded as belonging to the scope of

1 TSOLKA, O.: *Der Allgemeine Teil des europäischen supranationalen Strafrechts i.w.S.*, Europäische Hochschulschriften, vol. 1655, 29.

2 SCHUTTE, J.: *The European Market of 1993: Test for a Regional Model of Supranational Criminal Justice or of Interregional Cooperation in Criminal Law*, Criminal Law Forum, vol. 3, 1991–92, 57.

criminal law, too.[3] Petty offences represent an independent means of state action between administrative and criminal law. According to the definition adopted by the XIV. Congress of the AIDP in 1989 petty offences refer to a system "that is non penal in the legal sense, but whose philosophical foundation is nonetheless retributive".[4]

The meaning of supranationality refers to the form of action Community institutions take. It is generally accepted that European Community law is neither national nor international law, it represents a new independent area of law with a dynamic nature: supranational law.[5] The novel nature of the European Economic Community Treaty[6] and the legal order it had created was to be understood on the basis that the states had limited their sovereign rights and had established new political institutions which they had endowed with sovereign rights. Consequently, the institutions of the Community may adopt measures that are legally binding upon the Member States and individuals[7] and the Community has its own court of law. The European Court of Justice held that the constitutive treaties[8] of the Community had created a new legal order, which became a part of the legal systems of Member States and the law of

3 Petty offences are codified in statutes in Germany, Sweden, Finland, Italy and Portugal. See WAGEMANN, M.: *Rechtfertigung und Entschuldigungsgründe im Bußgeldrecht der Europäischen Gemeinschaft*, 1992, 15; DANNECKER, G.: *Strafrecht der Europäische Gemeinschaft*, in: Eser/Huber: Strafrechtsentwicklung in Europa, 1995, 2005.

4 DELMAS-MARTY, M.: *The legal and practical problems posed by the difference between criminal law and administrative criminal law*, Revue Internationale de Droit Pénal, 1988, 29. Therefore, we can witness a tendency towards subjecting administrative sanction to the principles and guarantees of criminal law both in the practice of the ECJ and in that of the ECtHR.

5 Case 26/62 *Van Gend en Loos* [1963] ECR 1, [1963] CMLR 105. The ECJ choose to avoid the problem of Member States' differing constitutional approaches to international treaties by describing the legal order created by the Member States under the EC Treaty as an entirely new system which was different in nature from international law. For further details see CRAIG, P. and BÚRCA, G. de: *EC Law, Text Cases & Materials*, 1996, 242.

6 One of the symbolic acts of Maastricht was to rename the EEC Treaty to EC Treaty [hereafter referred to as Treaty].

7 This latter aspect of supranationality is of special importance for the criminal law. Although EC law may impose legally binding obligations on individuals, it is the national law of the Member States which enforces it.

8 The constitutive treaties of the Community are the Treaty Establishing the European Economic Community [EEC Treaty], the Treaty Establishing the European Coal and Steel Community [ECSC Treaty] and the Treaty Establishing the European Atomic Energy Community [Euroatom Treaty].

which must be applied by the courts of the Member States.[9] Hence, domestic law and Community law exist next to each other and both of them are in force in the Member States.[10]

It follows from the above that European Community Criminal Law can only then be supranational, if Community institutions may adopt legally binding criminal provisions and sanctions.[11] A pardonable initial reaction after having read only the text of the Treaty would be a firm negative. However, this first impression could be misleading after a closer examination of the practice of the European Court of Justice and of the Commission. It is generally accepted that the Community does not have the competence to set supranational criminal law since no such transfer of sovereign rights had taken place.[12] This is the result of the will of the contracting Member State and it is reflected in the interpretation of the Treaty.[13] From the jurisprudence of the European Court of Justice it has become evident that it was "the intention of the drafters of the Community treaties that European Community law is a community of law

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9 Case 14/68 *Wilhelm v Bundeskartellamt*, 1969 ECR 1, [1969] CMLR 100.

10 The relationship of the two is regulated by the principle of supremacy which requires the courts of the Member States to accord primacy to Community law over conflicting national law. For further details see WEILER, J.: *The Community System: The Dual Character of Supranationalism*, Yearbook of European Law, 1981, 267.

11 TIEDEMANN, K.: *Der Allgemeine Teil des europäischen supranationalen Strafrechts*, in: Festschrift für Jescheck zum 70. Geburtstag (ed. Vogler, T.), 1985, 1411. One should not forget, however, that law materialises in its enforcement, thus, if the Member States have differing criminal procedures, even identical provisions of substantive criminal law will turn out to be different in each Member State. In order, to avoid this trap, criminal procedure must be harmonised paralelly to substantive criminal law. Otherwise no supranational criminal law could exist.

12 SIEBER, U.: *Europäische Einigung und Europäisches Strafrecht*, Zeitschrift für die gesamte Strafrechtswissenschaft, vol. 103, 1991, 970; TIEDEMANN, K.: *Reform des Sanktionswesens auf dem Gebiete des Agrarmarktes der Europäischen Wirtschaftgemeinschft*, in: Festschrift für Pfeiffer, 1988, 113; WINKLER, R.: *Die Rechtsnatur der Geldbuße in Wettbewerbsrecht der Europäischen Wirtschaftsgemeinschaft*, 1971, Tübingen, 84; DANNECKER: *op. cit.*, 1990; BRIDGE, J. W.: *The European Communities and the Criminal Law*, Criminal Law Review, 1976, 88; OEHLER, D.: *Fragen zum Strafrecht der Europäischen Gemeinschaft*, in: Festschrift für Jescheck zum 70. (ed. Vogler, T.), Geburtstag, 1985, 1403; ZULEEG, M.: *Der Beitrag des Strafrechts zur Europäischen Integration*, in SIEBER: *op. cit.*, 1993, 41.

13 DEN BOER, M.: *Europe and the Art of International Police Co-operation: Free Fall or measured Scenario?*, in: Legal Issues of the Maastricht Treaty (ed. O'Keeffe, D. and Twomey, P. M.): 1994, 285.

without a criminal law",[14] and that "the enforcement of law through the criminal law, has been left exclusively to the member states".[15] This constraint inheres in the constitutional foundations of the Community. The latter may exercise only those powers that can be derived from the Treaties creating it. Thus, the Community is not empowered to issue rules binding upon the Member States without an express legal basis in the constitutive treaties. While Art. 235 of the Treaty does allow the Council to take unanimously appropriate measures for the realisation of Community objectives within the framework of the common market, even in cases where the Treaty does not otherwise provide the necessary authority to do so, this article is construed as addressing substantive issues and not formal aspects of the powers of the Community institutions.[16] Accordingly, Art. 235 cannot be invoked to side-step obligations to consult the European Parliament or to curtail the jurisdiction of the European Court of Justice. Likewise Art. 235 cannot be invoked to extend the powers of the Community, a result that can be effected only by amending the Treaty as provided for in Art. 236.[17] Such powers would include those in the area of criminal law. A further argument in supporting this view is that the adoption of criminal provisions by the Council would not be reconcilable with the so-called democratic deficit of the Community.[18]

The fact that there is no supranational criminal law is not to say that the concept of European Community Criminal Law is empty. It does mean that the institutions of the European Community do not have jurisdiction over criminal matters and that European Community rules do not constitute a supranational criminal law in themselves. Only through enactment by the Member States as domestic penal legislation can the rules and principles advocated by the European Community enter the domain of criminal law. On the other hand, the Community may adopt sanctions to achieve the general protection of its interests

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14 Case 203/80 *Casati* (Guerrino), (Criminal Proceedings Against) [1981] ECR 2595, [1982] 1 CMLR 365, 2618.

15 Case 186/87 *Cowan* (Jan William) *v Trésor Public* [1989] ECR 195, [1990] 2 CMLR 613.

16 See Case 38/69, *Commission v Italy* [1970] ECR 47, [1970] CMLR 77.

17 Compare it with the procedure provided under Art. K.9 of Title VI of the TEU.

18 TSOLKA: *op. cit.*, 30. Democratic deficit refers to the simple fact that the body which has the greatest democratic claim, the European Parliament, was given the smallest part to play in the legislative process. The European Parliament has the claim to political legitimacy because it is directly elected. As opposed to the European Parliament, the Council's democratic creditals are indirect: they are political appointees but not elected at a European level.

and to enforce a certain conduct.[19] Moreover, Community law Regulations or Directives may oblige Member States to adopt adequate sanctions. Hence, we can conclude that a supranational sanctioning power does exist. Therefore, it has to be examined whether this set of rules can be regarded as criminal law.

III. Supranational sanctioning power

It is not always easy to discover whether a sanction is a truly criminal sanction or rather an administrative one. The answer to this problem is linked to the disputed position of petty offences and to the differentiation between administrative and criminal sanctions.[20] The movement towards individualisation within penal law leading to diversification of sanctions makes it more difficult to demarcate each of the systems of sanctions, for the criminal sanctions can no longer be identified with the deprivation of liberty. The philosophical foundations of the penal sanction *vis-à-vis* those of the administrative sanction became equally difficult to identify.[21] Is the difference qualitative or quantitative? The legal jargon of the European Community also draws a clear distinction between criminal and administrative sanctions so as to create the impression that these constitute two completely distinct areas of law, the first of which is wholly separate of European Community law whereas the second, at least to some extent, is not.

1. The legal character of fines imposed by the Commission

Community law requires the adoption of sanctions the legal character of which is controversial. It is disputed whether some of them should be classified as punishment or as clear administrative acts. The answer to this problem is necessary in order to decide whether the Community bears a *de facto* supranational sanctioning power.

The XIVth Congress of the AIDP in 1989 pointed out that it was the job of the legislator to decide how certain conduct should be punished, i.e. by

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19 TSOLKA: *op. cit.*, 30, 31.

20 For further details see the national reports in the Revue International de Droit Pénal, 1988; CARACCIOLI: *La protection de resources propres de la Communité et l'evolution de droit pénal fiscal en Europe*, Séminaire sur la protection juridique des intérets financiers de la Communité, Bruxelles, 1993.

21 DELMAS-MARTY: *The legal and practical problems..., op. cit.*, 21.

means of criminal or administrative measures. This attractive concept, however, does not eliminate the dilemma that big amount administrative sanctions at the end of the day turn out to be punishing. Furthermore, as Tiedemann pointed out, the labelling of some sanctions as "no punishment" could have the result that it would not be any longer the legislator alone who decides upon the legal classification of sanctions. It would also depend on criteria of substantive law.[22] Hence, in order to classify the sanctions employed by the Community it is necessary to establish a European criterion.[23]

The most obvious would be to carry out legal comparison between the national laws of the Member States. This, however, does not help since the latter vary a lot as to the relationship between criminal punishment and administrative sanctions.[24] Therefore, we have to take as a starting point for classification the nature and gravity of the sanction. It is widely accepted that the main aim of a criminal sanction is both to suppress illicit conduct and to prevent similar violations by the same or other actor. As the XIVth Congress of the AIDP concluded "[t]he difference between criminal law and administrative penal law implies limitations on the kind and severity of sanctions available, as well as on the restrictions of individuals rights permissible in the course of administrative penal procedure".[25] Consequently, if the sanctions have a suppressive and preventive aim and if they are more severe than administrative measures are usually then they cannot be regarded as clearly administrative sanctions.[26]

The above criterion leads to further questions in the case of companies. Namely, if the legal subject of a measure is a company, how should the gravity of a sanction be assessed. In cases of fines it is easy to decide. The gravity of the sanction is reflected in the amount, i.e. if the sum is higher than that of the indemnisation and if its aim is deterrent it clearly represents a serious

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22 TIEDEMANN, K.: *Sanktionen gegen Wirtschaftskriminelle*, in: Haesler (ed.), Politische Kriminalität und Wirtschaftskriminalität, 1984, p. 273. This concept is supported by the Strassbourg jurisprudence. The ECtHR disregards the label of a certain action in classifying it and considers only the type and gravity of the sanction and its preventive or suppressive function. See the judgement in *Lutz* of 25 August 1987 in: EuGRZ 1987, 399.

23 TSOLKA: *op. cit.*, 35.

24 *Op. cit.*, 43.

25 XIVth International Congress on Penal Law, Vienna 1–7 October, 1989, Congress Proceedings, 251.

26 DANNECKER, G.: *Das interpolare Strafrecht*, Tübingen, 1993, 252; TIEDEMANN, K.: *Der Einfluß des Verfassungsrecht auf die Entwicklung der Rechtsordnung*, 40 Jahre Grundgesetz, 1990, 160.

intervention into the property of the company. However, there are also further possible sanctions such as, for example, the closing down of the company. To measure the gravity of such a sanction it is necessary to take into consideration both the essential character and activity of the company. As long as the sanction represents a serious interference with the economic existence and development of the company it is very likely that it is within the scope of criminal law.

Community law must be analysed in the light of the above considerations. The only provisions of the Treaty which might appear to relate to the criminal law are those which impose financial penalties on persons who have violated certain obligations of Community law.[27] The best known examples of such penalties are contained in Art. 87 (in connection with the rules on competition); in Art. 9 of Commission Decision No. 2794/80/ESCS (in connection with establishing a system of steel production quotas)[28] and in Art. 58 (4) of the ECSC Treaty (in connection with steel production).

As regards Art. 87, the Community has power to impose pecuniary sanctions for violations of the rules on competition and of obligations to provide information needed to enforce these rules.[29] Art. 87 of the EC Treaty authorises the making of Regulations to give effect to those rules and expressly includes provisions for "fines and periodic penalty payments". This power has been exercised by Reg. 17 on the basis of which the Commission can fine companies or association of companies that deliberately or negligently violate the provisions of Arts 85 and 86 regarding cartels and the abuse of economic powers, deliberately or negligently false or distort information, fail to produce

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27 The Council Regulation on Harmonisation of Controls and Sanctions in the Framework of the Common Agricultural and Fisheries Policy laid down specific penalties which apply in the event of infringements by the beneficiary of the conditions of the aids regime. The sanctions typically provided are reduction in, or total loss of, the aid of which the beneficiary would have been entitled to, the exclusion of the beneficiary from the aid scheme for subsequent marketing years, or the withdrawal of the licence necessary for an operator or processor. The Commission has maintained that these are administrative penalties which the Community has the competence to lay down by virtue of Art. 43 of the EC Treaty. Germany initiated proceedings before the ECJ concerning the legal nature of such sanctions. Germany insisted that the sanctions in question are of a criminal character, but the ECJ supported the view of the Commission and rejected the German application.

28 Commission Decision No. 2794/80/ESCS of 31 October 1980 Establishing a System of Steel Production Quotas for Undertakings in the Iron and Steel Industry, OJ L 291 of 31 October 1980, 1.

29 This sanctioning power is elaborated in Council Regulation 17/62 of 6 February 1962 Implementing Arts 85 and 86 of the Treaty, 1959–1962 OJ Special Edition 87.

requested information in a timely manner, or refuse inspection of their business records. Even though the penalties may be quite substantial, the applicable regulation states explicitly that the decisions by which fines are imposed are not of a criminal character.[30] Although according to general opinion, no final conclusion can be drawn from Art. 15 (4) of the said Regulation as to the character of the fines, they are administrative in the sense that they are imposed not by a criminal court but by an administrative organ, the Commission.[31] However, after having taken a closer look in the matter, it becomes clear that fines imposed pursuant to Art. 15 (4) are of a character similar to criminal law.

One can start with the English text of the Regulation that refers to *fines*. This term is used for describing criminal and not administrative measures.[32] In order to overcome these ambiguities it is necessary to analyse the practice of the Commission and the European Court of Justice.

The European Court of Justice held in *Chemiefarma* that the imposition of fines is not limited to the repetition of an offence; such an interpretation of Art. 15 would considerably lessen the deterrent effect of the fine. Furthermore, the European Court of Justice made clear that the imposition of fines serves both the punishment of offences committed in the past and ensures the obedience to European Community law for the future.[33] Accordingly, the European Court of Justice expressly recognised that fines under Art. 15 fulfil the two of the constitutive elements of a criminal sanction, i.e. suppression and prevention. The Commission follows a similar practice to that of the European Court of Justice. The current sanctioning policy of the Commission shows that it attaches great importance to the deterrent object of the fine. For the first time in the *Pioneer* proceedings the Commission has considerably increased the fine and thereby marked the start of a stricter policy as regards gross violations of competition law.[34] The European Court of Justice justified the shocking amount of the fine by saying that one of the tasks of the Commission is the obligation to investigate and suppress illicit conduct. This includes the exercise of a general policy the objective of which is to ensure the application of fundamental principles of European Community law and to co-ordinate the conduct of companies in the light thereof. Hence, the amount of the fine must

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30 Currently the maximum possible fine is 1.000.000 ECU or 10% of the undertaking's previous year's turnover.

31 BRIDGE: *op. cit.*, 89.

32 *A dictionary of Law* (ed. Martin, E.), Oxford, 3rd edition, 164.

33 Case 41/69 of 15 February 1970, *ACF Chemiefarma v Commission* [1970], ECR 661.

34 OJ L 60 of 5 March 1980, 21.

be adjusted to the requirements of that policy.[35] Both the European Court of Justice and the Commission take into consideration the same criteria when imposing the fine. These are the followings: the gravity and duration of the violation, the relationship between the type of the violation and the economic strength of the company and the delays in the Commission's own reaction.[36] The Commission delivers its decision in a way that it compares the decision to the earlier ones with the aim of preventing the company from committing similar violations.[37]

It has to be mentioned here that Advocat General Roemer made an attempt to classify fines according to the legal systems of the Member States. He came to the result that fines bear the same legal character as "*financial penalties*" [Geldbuße] which under German law belong to the scope of petty crimes, i.e. to criminal law.[38] While, Advocat General Mayras described the fines in *Boeringer II* as "administrative sanction of a non-penal character"[39] which, however,—due to their substantive criminal nature—cannot be separated from all the principles of criminal law. The opinion of Advocat General Mayras clearly mirrors the very fine line which is to balance between on the one hand, the requirement that the rule of law is upheld, i.e. substantially criminal sanctions are subject to the guarantees of criminal law, and on the other, that the Community does not interfere with the discretion of Member States as regards criminal law. The same act of balancing can be observed as regards Art. 9 of Commission Decision No. 2794/80/ESCS and Art. 58 (4) of the ECSC Treaty.

In the court proceedings of *Thyssen* and in that of *Estel* the main issue was whether the application of Art. 9 requires proof of culpability.[40] The Commission rejected the need to prove culpability by emphasising the non-penal character of the fine. For justifying its decision the Commission underlined the need for an automatic system of fines[41] and further made clear that Art. 9 does not allow to take into consideration subjective circumstances.

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35 Case 100-103/80 of 7 June 1983, *Musique Difusion Francais, Pioneer, Melchers*, [1983] ECR 1825; [1983] 2 CMLR 221.

36 *See* Case 86/82 *Hasselblad (G.B.) Ltd. v Commission* [1984] ECR 883, [1984] 1 CMLR 559; Case 19/77 *Miller Int'l v Commission* [1978] ECR 131, [1978] 2 CMLR 334.

37 TSOLKA: *op. cit.* 46.

38 Case 14/68 *Wilhelm v Bundeskartellamt*, 1969 ECR 1, [1969] 1 CMLR 100.

39 Case 7/72 *Boegringer Mannheim GmbH v Commission* [1972] ECR 1281.

40 Case 188/82 *Thyssen AG v Commission* [1983] ECR 3721 and Case 270/82 *Estel NV v Commission* [1984] ECR 1195.

41 The automatic system of fines was established by Commission Decision 1831/81 of 24 June 1981, OJ L 180 of 1 July 1981, 1.

Consequently, the Commission did not reject the application of culpability to sanctions similar to the ones in criminal law, but it simply refused the criminal character of the fine.[42] Hereby, a decisive point of view emerges: The proof of culpability is a clear feature of criminal sanctions. If this view of the Commission is applied to Art. 87 then it establishes the criminal character of competition fines.

The above opinion was expressed by Advocat General Verloren von Themaat in his concluding remarks in *Thyssen.* That puts into question the Commission's standpoint on the legal character of the fines. Advocat General Verloren von Themaat emphasised that all fines, including those in Art. 9 of Decision No. 2794/80/ESCS, have the same legal character, similar to that of criminal law. Since the need for a system of automatic fines does not exclude the suppressive and preventive objects thereof, we should agree to this approach of the Advocat General.

Advocat General Slynn cited the concluding remarks of Advocat General Verloren in *Estel* in connection with the automatism of the imposition of fines. Advocat General Slynn stated that the latter does not mean that the amount will be imposed without having taken into account the circumstances of the individual case.[43] The automatism simply means that they are generally imposed at a specific rate. Generally does not mean universally, it means usually.[44] Although the European Court of Justice did not address this issue explicitly in *Estel*, after having considered the individual circumstances of the case it decided to reduce the amount of the fine. Hence we can conclude, that the European Court of Justice impliedly agreed to the approach of the Advocate General. The judgement in *Thyssen* and *Estel* demonstrates that fines pursuant to Art. 9 bear the same legal character as the ones under Art. 87.

Finally, as far as Art. 58 (4) is concerned, in *Bertoli*[45] the affected company argued that the Commission had disregarded the principle of *nullum crimen sine lege* by the application of Art. 58 (4) ECSC Treaty, because it applied new criteria for the imposition of fines and by doing so disregarded the previous practice. The Commission replied that the principle brought up by

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42 TSOLKA: *op. cit.*, 46–47.

43 According to AG Slynn if automatism means that the flat rate is to be applied irrespective of the surrounding circumstances, it seems to contradict the plain words of Art. 12 of the ESCS Treaty. Case 270/82 *Estel NV v Commission* [1984] ECR, Opinion of the Advocat General, 1255.

44 Case 270/82 *Estel NV v Commission, ibid.*

45 Case 8/83 *Officine Fratelli Bertoli SpA. v Commission* [1984] ECR 1649.

Bertoli did not apply for the imposition of fines under Art. 58 (4) since the latter is an administrative act and as such it is not subject to the principles of criminal law. The European Court of Justice left open the issue of culpability and rejected the argument of Bertoli with the reasoning that the fine in question does not exceed the limit contained in Art. 64 of the ECSC Treaty. Though this way the European Court of Justice implicitly accepted the principle.

In conclusion it can be established that all mentioned fines have the same character. This is in line with the requirement of uniform interpretation and application of European Community law.[46] Furthermore, it follows from the above discussion that fines have a similar character to the ones in criminal law. Thus, the Commission is bound by several criminal law principles when imposing such sanctions.[47] In summary, European Community law requires deliberate or negligent action for violations. Here the European Court of Justice requires proof of intent or culpability in the same manner as is required for criminal liability.[48] In addition the European Court of Justice has addressed the question whether the right of the Commission to impose fines is restricted or even abrogated in cases where the same violation of anticompetition rules has already been fined by the national authorities of the Member State concerned.[49] This question has been answered in the negative in the same sense that national and Community law on competition may be applied cumulatively. Nevertheless, when applying sanctions under authority of Community law, the Commission has to take into account the sanction imposed and enforced under national law. Thus, there is no provision against double jeopardy but there is an obligation to offset Community sanctions by the amount of any domestic sanction. The Commission is also bound by the criminal law principle of proportionality—as I mentioned it earlier—embracing such considerations as the gravity of the violation and culpability of the actor.[50]

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46 WINKLER: *op. cit.*, 18.

47 This is in line with the Resolution adopted by the XIVth Congress of the AIDP on Penal Law, according to which "[a]dministrative penal law resembles criminal law in that it provides for the imposition of retributive sanctions. This similarity requires application of the basic principles of criminal law and of due process to the field of administrative penal law." XIVth International Congress on Penal Law, Vienna 1–7 October, 1989, Congress Proceedings, 250.

48 Compare case 26/75 *General Motors Continental v Commission*, 1975 ECR 1367 [1976] 1 CMLR 95; with Joined Cases 100-103/80 *Musique Duffison Francais (Pioneer) v Commission*, 1983 ECR 1825, [1983] 3 CMLR 221.

49 Case 14/68 *Wilhelm v Bundeskartellamt, op. cit.*

50 The ECJ has repeatedly recognised that Community law embraces the principle of proportionality. For example Case 118/89 *Firma Otto Lingenfelser v Bundesamt für*

2. Human rights dimension

The Community has announced the wish to accede, as the European Community, to the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereafter referred to as ECHR] which is binding upon all member states of the Council of Europe and therefore also upon all Member States of the Community.[51] Accession to this convention may impinge on the power of the Commission to impose fines for the violation of Arts. 85–86 of the EC Treaty.

Art. 6 of the ECHR states that in the determination of an individual's civil rights and obligations and in the determination of a criminal charge the individual shall be entitled to a fair and public hearing, without undue delay, by an independent and impartial tribunal established by law, with judgement rendered publicly (anyone charged with a criminal offence has certain additional rights).

The question arises whether this provision would apply to the imposition of fines under the Treaty and, if so, whether proceedings pursuant to the Treaty are compatible with Art. 6 of the ECHR. In Schutte's view, the first part of the question has to be answered in the affirmative; the second part, in the negative.[52] According to him, the express statement in Regulation No. 17 that decisions by which cartel fines are imposed are not of a criminal character is to no avail. The question whether proceedings are criminal proceedings that tigger the full panoply of rights guaranteed by Art. 6 is answered by the authorities charged with interpreting the ECHR—the European Commission of Human Rights and the European Court of Human Rights[53]—not by reference to the characterisation of the proceedings under the law of the contracting parties concerned. To decide whether a criminal charge has been made, for

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Ernährung [1991] 3 CMLR 571; Case 181/84 *Regina v Intervention Bd.* [1985] ECR 2889, [1985] 3 CMLR 759.

51 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Europ. T.S. No. 5. In Opinion 2/94 the ECJ concluded that the absence of specific powers in the Treaty, combined with the far-reaching effects of accession to the ECHR would be of such constitutional significance as to go beyond the scope of Art. 235 and could be brought about only by amending the Treaty. This has not yet taken place. Furthermore, the UK has a special position under the ECHR. It signed the ECHR but did not implement it into national law, thus, it cannot be invoked before British courts.

52 SCHUTTE: *op. cit.*, 61.

53 Arts. 19–56 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Europ. T.S. No. 5.

example, these organs take into account a number of criteria, including the purpose of available sanctions, the class of persons subject to the norm that has been allegedly violated (is it a closed class of limited size or an open class of indeterminate size?), and the seriousness of the maximum sanction that may be imposed.[54] If the purpose of the sanction is punitive, if the class of persons to whom the norm applies indeterminate, and if the magnitude of the sanction is considerable, then the proceedings will be regarded as procedures for the determination of criminal charges within the meaning of Art. 6 and the terms of that article has to be met. Notwithstanding that the Court has upheld certain administrative proceedings in a limited class of cases involving petty offences,[55] the proceedings leading to the imposition of cartel fines by the Commission do not fall within this exception, given the magnitude of the maximum sanction available.

These proceedings fail to satisfy Art. 6 in a variety of ways. The Commission is not an independent and impartial tribunal within the meaning of Art. 6. Fines are not imposed following a fair and public hearing of the case. No provision is made to guarantee the presumption of innocence, as required by Art. 6 (2); on the contrary, even if a company is already suspected of having violated the anticompetition rules it can be forced (on penalty of paying fines) to provide self-incriminating information to the Commission.[56] Finally, no provision has been made to guarantee the rights due to anyone subject to criminal charge, pursuant to Art. 6 (3).

The underlying idea of the above consideration is to apply the criteria laid down in the ECHR to companies. This would mean the application of criteria which were developed for natural persons to legal persons. If we accept the viewpoint of Schutte, it would seem, that upon accession by the Community to the ECHR, the power to impose fines could no longer be exercised without breaching Art. 6 of the former instrument. However, if one starts to apply the

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54 Compare Engel v. Netherlands (No. 1 & 2), 22 Eur. Ct. H. R. (ser. A), 1976 with Öztürk v Germany, 73 Eur. Ct. H. R. (ser. A) 1984.

55 The European Court of Human Rights took the position in Öztürk that the cited Art. 6 requirements need not be observed at all trials of the first instance provided that an appeal may be lodged to a higher tribunal complying fully with Art. 6. Accordingly the Court upheld summary administrative proceedings in Germany for traffic and other property offences. The fact that such proceedings are designated as administrative is irrelevant since parties to the ECHR are not allowed to circumvent their obligation undertaken in Art. 6, simply by labelling certain procedure administrative.

56 Case 155/79 *AM & Europe Ltd. v Commission*, 1982 ECR 1575, [1982] 2 CMLR 264.

same criteria for legal persons as for natural persons the whole system of the ECHR could brake down. There is no unanimous solution as regards the possibility of legal persons to become beneficiaries of human rights. Human rights were developed traditionally in order to protect the individual as opposed to the state. How should these principles be applied to legal entities? Contrary to Schutte, I would suggest that the answer is not that clear cut. Even if one assumes that legal persons can have human rights it remains still unclear to which extent should human rights apply to legal persons.

3. Punitive powers of the Commission

I shall now consider whether the Community is entitled, under present Community law, to exercise punitive powers outside the area covered by the Treaty, in particular by permitting the Commission to impose pecuniary sanctions on individual natural or legal persons.[57] The only example of such a right under existing law is to be found in Art. 79 (3) of the Treaty allowing the Council to delegate to institutions of the Community responsibility to ensure the abolition of discrimination with respect to freight and transport conditions. These provisions have been implemented by regulation authorising the Commission to impose pecuniary sanctions on commercial carriers for failing timely to provide information, for intentionally providing false information, or for practising prohibited discrimination.[58]

The Commission, however, holds the view that its general competence to execute decisions of the Council implies the right to apply sanctions, on condition that such a right has to be made explicit in European Community Regulations.[59] Thus, the Commission has recently submitted a proposal to the Council for a Regulation that would provide for controls and sanctions regarding the common agricultural and fisheries policy. In the explanatory note to this proposal, the Commission arrogated to itself authority to lay down rules on controls (by officials of the Commission) and to impose sanctions (by the

57 Leaving aside any powers derived from the Art. 95 of the ECSC Treaty and the decrees issued under this article.

58 Council Regulation 11/60 of 27 June 1960 Concerning the Abolition of Discrimination in Transport Rates and Conditions, 1959–1962 OJ Spec. Ed. 60.

59 SCHUTTE: *op. cit.*, 63.

Commission).[60] This position is contested by several Member States and probably quite rightly.[61]

Since the drafters of the Treaty decided to attribute sanctioning powers to institutions of the European Community only in the area of competition, the Commission cannot claim similar powers in other areas.[62] Both international and national law require sanctioning power to be explicitly conferred in writing on the competent authority by legislation.[63] Such powers cannot be inferred which is exactly what the Commission seems to claim. Moreover, there is ample jurisdiction of the European Court of Justice recognising that punishment of breaches of Community law is a matter within the exclusive competence of the Member States. This competence is not circumscribed by European Community directives and regulations prescribing that Member States shall provide for the necessary sanctions to ensure compliance but leaving the determination of sanctions, as well as their application, to the Member States.

Finally, sufficient argument can be drawn from Art. 5 of the Treaty to challenge the competence of the Community institutions in this respect. Art. 5 requires the Member States to take all appropriate general and specific measures to ensure compliance with obligations resulting from the Treaty or from any acts emanating from Community institutions. The fact that Member States are bound, in keeping with the obligations under Art. 5, to certain limiting conditions set by Community law (principles of assimilation,[64] proportionality[65] and non-discrimination[66]), does not effect their exclusive competence in the area of sanctions. To provide the institutions of the Community, in particular the Commission, with additional sanctioning powers apart from those already exercised by virtue of Arts. 87 and 79 of the Treaty

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60 Commission Proposal for a Council Regulation on the Checks and Penalties Applicable under the Common Agricultural and Fisheries Policies, OJ 1990, C 137, 10.

61 KAPTEYN–VERLOREN van THEMAAT: *Introduction to the Law of the European Communities,* 2nd ed., 1990; OEHLER: *op. cit.*, 1403; ZULEEG: *op. cit.*, 45.

62 SCHUTTE: *op. cit.*, 64.

63 The applicable principle is embodied, for example, in the ECHR at Arts. 6–7.

64 Case 326/88 *Public Prosecutor v Hansen & Sons* (Eur.Ct.Just. 10 July 1990); Case 68/88 *Commission v Greece* 1989 ECR 2965, [1991] 1 CMLR 31. According to the assimilation principle, Member States are supposed to treat violations of Community interests in the same manner as they would treat violations of comparable national interests.

65 Case 299/86 *Italy v Drexl,* 1988 ECR 1213, [1989] 2 CMLR 241; Case 203/80 *In re Casati,* 1981 ECR 2595, [1982] 1 CMLR 365; Case 157/79 *Regina v Pieck,* 1980 ECR 2171, [1980] 3 CMLR 220; Case 8/77 *In re Sagulo* 1977 ECR 1495, [1977] 2 CMLR 585.

66 See Art. 2 of the Treaty.

would require amendment of the Treaty and approval by the parliaments of all Member States.

Consequently, a European supranational sanctioning power *de facto* exists. Its nature is similar to that of criminal sanctions; it is neither purely administrative, nor criminal. It exists only within the scope of economic criminal law and serves the proper fulfilment of the objectives of the Treaty. Generally accepted principles of criminal law apply to the imposition of such sanctions and the Commission does not have any power to extend the scope of sanctions.

IV. The enforcement of Community law via national criminal law

Although the Community lacks competence in criminal matters in a narrow sense, i.e. responsibility for insuring compliance, as well as for applying sanctions in cases of violation, the Community does have power, on the one hand, to impose obligations on the Member States to carry out their mandate to enforce Community law and, on the other, to oversee and sanction the efforts of Member States in this area.[67] These obligations can result in criminal law, but this is not necessarily so.

Many Community instruments explicitly impose obligations upon Member States to provide for penalties.[68] In some cases it is specified that violations should be subject to penalties whether of a criminal or of an administrative nature. Construing Art. 5 of the Treaty, the European Court of Justice has ruled that Member States are free in their choice of the nature of sanctions but have to ensure that violations of European Community law are dealt with and punished in a manner analogous to that applied to comparable violations of national law and that the applicable sanctions are effective, proportionate and dissuasive.[69] The European Court of Justice underlined that criminal procedure

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67 Art. 7 of the Treaty.

68 BRIDGE: *op. cit.*, 88; DINE, J.: *European Community Criminal Law*, Criminl. Law Review, 1993, 247; THOMAS, S.: *Die Anwendung des europäischen materiellen Rechts im Strafverfahren*, Neue Juristische Wochenschrift, 1991, 2234.

69 "Art. 5 of the Treaty requires MS to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

involving the enforcement of a Community interest must be carried out with the same precision and thoroughness as a similar procedure for the protection of national interests. Consequently, Community interests were assimilated to national interests and the exercise of legally protected positions of a Community law nature was recognised.

It seems that the assimilation with the national law is a minimum requirement: it takes second place to the requirement that the penalty be effective and proportionate.[70] That means that eventually it is for the European Court of Justice to assess whether the enforcement of provisions of European Community law through the national criminal law is effective and proportionate. It might say, for example, that the enforcement level—or any aspects thereof—in any national system is too low to be deemed effective and proportionate, even if the enforcement level corresponds with the enforcement level of national law. Since there are large divergences in the level of enforcement of provisions of Community law by the Member States, the European Court of Justice might in this manner seek to harmonise and enhance the enforcement level of Member States.[71]

It is not uncommon for a directive or a regulation to oblige Member States to provide for adequate sanctions to guarantee compliance with it. For instance, Art. 8 of Council Regulation 729/70, which deals with financing of the common agricultural policy, obliges Member States to prevent, and bring actions against, irregularities.[72] The reference to initiating proceedings may authorise criminal proceedings.[73] Art. 11 of Council Regulation 2241/87 regarding controls on fishing activities, requires national authorities to take criminal or administrative sanctions, which according to the relevant provisions of national law, may lead to depriving those who are responsible for a violation of any consequential profits or to any other result commensurate with the seriousness of the violation and sufficient to deter similar future violations.[74] More recent instru-

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Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws." Case 68/88 *Commission v Hellenic Republic* [1989] ECR 2965.

70 LENSING, H.: *The Federalization of Europe: Towards a Federal System of Criminal Justice*, European Journal of Crime, Criminal Law and Criminal Justice, 1993, vol. 3, 223.

71 LENSING: *ibid.*, 223.

72 Art. 5, 155, 169.

73 SCHUTTE: *op. cit.*, 65.

74 Council Regulation 2241/87 of 23 July 1987 Establishing Certain Control Measures for Fishing Activities, 1987 OJ L 207, 1.

ments—regarding insider trading,[75] prevention of the use of certain substances for the illicit production of narcotic drugs and psychotropic substances[76] and money laundering[77] impose obligations on the Member States to set sanctions sufficient to promote compliance with measures taken pursuant to these instruments. In conformity with the assimilation principle proposals for a regulation on the Community cultivation rights and for a directive on the control of the acquisition and possession of firearms[78] contain provisions obliging Member States to apply the same sanctions for infringement of these provisions of European Community law as for similar infringements of domestic law.

As noted earlier, Member States are generally free to choose the most appropriate sanctioning mechanism available under domestic law.[79] It is still an open question whether the Community can force Member States to sanction certain infringements through criminal proceedings only.[80] In imposing such obligations on Member States, the Community has always been careful to avoid unambiguous mandates to introduce or apply criminal sanctions only.[81] The intention is twofold: to leave discretion in this respect to Member States and, equally important, to avoid the impression that European Community law may impinge upon domestic criminal law so directly.[82] Administrative sanctions are, thus, considered appropriate alternatives in all cases. In this regard, the

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75 Council Directive 89/592 of 13 November 1989 Coordinating Regulations on Insider Trading, 1989 OJ L 334, 30. For more detail see TRIDIMAS: *Convention on Insider Trading*, ELR, 1993, 435.

76 Council Regulation 3677/90 13 December 1990 Laying down Measures to Discourage the Diversion of Certain substances, 1990 OJ L 357, 1.

77 Council Directive 91/308 of 10 June 1991 on Prevention of the Use of Financial System for the Purpose of Money Laundering, 1991 OJ L 166, 77.

78 Council Directive 91/447 of 18 June 1991 on the Control of the Acquisition and Possession of Weapons, 1991 OJ L 256, 51.

79 SEVENSTER, H. G.: *Criminal Law and EC Law,* CMLRev., vol. 29, 1992, 33; TIEDEMANN, K.: *Europäisches Gemeinschaftsrecht und Strafrecht*, Neue Juristische Wochenschrift, 1993, 26.

80 One possible way of doing it would have been to adopt detailed Directives providing for criminal sanctions. Such Directives can become self-executing. The ECJ, however, expressly refused the direct effect of Directives that disadvantage citizens. For further details see Case 14/68 *Pretore di Salo v X* [1987] ECR 2545.

81 SCHUTTE: *op. cit.*, 58.

82 SCHUTTE: *ibid.*

Community goes so far as to avoid using the term punishment, referring instead to sanctions.[83]

The recent directive on money laundering is no sufficient support for an affirmative answer to this question, because it follows form the inter-governmental declaration, adopted by the Member States when accepting the directive that they regard the obligation to criminalise money laundering not as an obligation under European Community law but as an obligation resulting from their signature of certain conventions of the United Nations and the Council of Europe.

V. Co-operation in criminal justice

In its decision concerning the draft Convention of the International Atomic Energy Agency on Physical Protection of Nuclear Material[84] the European Court of Justice outlined the division of responsibilities between the Community on the one hand and the Member States on the other. With respect to provisions of a criminal law nature, especially those dealing with international co-operation in criminal matters, the European Court of Justice ruled that these subjects were undoubtedly within the competence of the Member States alone.[85] The Member States were obligated to take the necessary implementing measures, each for its own territory, regarding deployment of police forces, initiation of criminal proceedings and extradition.

It is clear from that decision that international co-operation in criminal matters, even in areas where the Community has normative powers, is outside the competence of the Community.[86] Therefore, the Council of Europe has done most of the work in the area of judicial co-operation in criminal matters.[87]

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83 This latter term does not exclude the possibility of criminal law, but does not infer it either.

84 Ruling of 1 November 1978 pursuant to Art. 103 of the EAEC Treaty, 1978 ECR 2151 [1979] 1 CMLR 131.

85 § 31, 36 of Ruling of 1 November 1978 pursuant to Art. 103 of the EAEC Treaty, 1978 ECR 2151 [1979] 1 CMLR 131.

86 SCHUTTE: *op. cit.*, 70.

87 DEN BOER: *Europe and the Art of International...*, *op. cit.*, 286.

1. The reasons

The reasons for the emergence of a European perspective in international co-operation in crime control are manifold and lie on different levels.[88] As regards the international level criminal policy was stimulated by the following three factors:[89]

1. Firstly, the emergence of the post-industrial information society lead to an increased dependence on information and information technology.

2. Secondly, the emergence of a stake holder society is characterised by increased risk in the whole spectrum of life.

3. Finally, the emergence of a "world society" as the result of the greater mobility of persons, capital and information lead to the decreasing importance of national borders (both in the world and Europe).

The post-industrial society is based on the value of information [i.e. *information society*]. Both the state, private undertakings and the individual citizen are widely linked to computer systems with data banks and networks which make available the rapid transmission of information from any one part of the world to another one. International communication systems are of vital importance for our society and for modern economy. Therefore, attacks on such systems can cause dramatical effects not only for the actual victim but for all participants in the network and the individuals affiliated to them who otherwise would not be affected by traditional forms of crime. For example, business espionage via computer networks might endanger hundreds of working places in the affected company. A small manipulation of data—for example—in data banks of the stock exchange may endanger millions of people. It does not play a role any longer where the offender and the victim are geographically located. On several instances the offender and his victim do not meet personally. Illegal activities carried out in one country might directly effect computer systems in other countries.[90]

The worldwide effects [hence *world society*] of offences do not only occur in relation to computer systems but also, for example, in the area of environmental protection. The best examples are polluted rivers or radioactive waste. An integrated Europe cannot cope with excessive disparities in the field

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88 TITSOUTRA: *Faut-il un droit pénal européen?*, Povoirs 1990, 133.

89 SIEBER, U.: *Memorandum für ein Europäisches Srafgesetzbuch*, Juristen Zeitung, 1997, issue 8, 369.

90 SIEBER, U.: *The international handbook on computer crime*, 1986, 114.

of criminal law and criminal justice, since they produce unwanted distortions and the so-called "oasis"-effect.[91]

As regards the European level there is a pressure flowing from the existence of a single European market in which barriers to the movement of persons, of goods and of capital have been removed, and from the creation of the concept of the European citizen, to remove incompatibilities in national legal systems which are discordant with these developments.[92] There must be a change away from the idea of national jurisdiction founded on territoriality which is anachronistic in a time when the majority of economic legislation has its source in Brussels and is Community-wide in its effects. There must be drastic changes in the procedures which enable prosecutions to be transferred from one jurisdiction to another and which provide for a judge in one Member State to obtain evidence or other legal assistance from judges in another.

2. The role of the Council of Europe

As was already mentioned earlier, the Council of Europe had a decisive role in setting up the law and the institutions of co-operation in crime control in Europe. Consequently, traditional interstate co-operation in criminal matters between judicial authorities (such as extradition and mutual legal assistance) is governed, in the mutual relations among the Member States of the Community, by a network of treaties most of them elaborated within the framework of the Council of Europe. These legal arrangements are now generally regarded as the "body of law governing co-operation in criminal matters among the Member States of the European Union".[93] We should note, however, that not only the Member States of the European Union profited from these efforts but also all other members of the Council of Europe and states who had only an observer status.[94]

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91 JUNG, H.: *Criminal Justice—A European Perspective*, Criminal Law Review, 1993, 238.

92 MOOR, L. de: *Commission initiative on the legal protection of the financial interests of the Community*, in: G. Dannecker (ed.), Combating Subsidy Fraud in the EC area, 1993, 21.

93 DEN BOER: *Europe and the Art of International..., op. cit.*, in: Legal Issues of the Maastricht Treaty (ed. O'Keeffe, D. and Twomey, P. M.), 1994, 286.

94 Twenty five European States are currently members of the Council of Europe; a large number of other states, for example, the USA and Canada enjoy observer status. For further details on the organizatorial structure of the Council of Europe see WILKITZKI, P.: *Development of an Effective Crime and Justice Programme—A European View*, in: Eser/Lagodny, Principles and Procedures for a New Transnational Criminal Law, 1992, 267 and SIEBER: *Memorandum für ein Europäisches..., op. cit.*, issue 8, 371.

The institutions of the Council of Europe dealt with all aspects of criminal law including constitutional law and human rights, substantive criminal law, criminal procedure and international legal assistance. Above all, tribute has to be paid to the ECHR with the Strasbourg Commission and Court.[95] The Strasbourg judiciary has established a growing set of precedents from which flows a loosely-knit European system of references and guidelines for the domestic jurisdictions.[96] It guarantees basic procedural rights in the whole of Europe. Besides that the Council of Europe has launched many of the international treaties which have added to the network of co-ordinated interaction.[97] Up until now 19 such conventions have been concluded among which the Convention on Extradition and the Convention on Legal Assistance are of special importance.[98] Moreover, the Council of Europe has by way of its recommendations spelled out its position on many controversial issues, a position which usually arose from the filtered knowledge of its national contributors. For example, it has recommended in the field of computer related crimes to transpose into national law a list with precisely described minimal provisions which are to be supplemented with an additional optional list.[99] In the field of environmental protection where international co-operation is especially complicated and the danger of cross-border criminality is particularly high the Council of Europe has recommended the Draft Convention for the Protection of the Environment by means of criminal law. The latter aims at the

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95 JUNG: *op. cit.*, 241.

96 As to their impact on criminal law and criminal policy see BENGOETXEA, J.–JUNG, H.: *Towards a European Criminal Jurisprudence? The Justification of Criminal Law by the Strasbourg Court*, 1991, 239.

97 JESCHECK, H.: *Möglichkeiten und Probleme eines europäischen Strafrechts*, in: Festschrift für Jhong Won Kim, Seoul, 1991, 947, at 955.

98 JESCHECK, H.: in *Leipziger Kommentar zum Strafgesetzbuch*, 11 (ed.) 1992, Introduction; Vogler, *Die strafrechtliche Konventionen des Europarats*, Jura 1992, p. 586. It is true that so far no real harmonisation has been reached in a lot of areas and that many of the conventions have only insignificant practical use. Since the Council of Europe is an international organisation which is based on the co-operation of the participating governments the realisation of its conventions is dependent upon its members. At the same time the Council of Europe is the only institution in Europe which possesses the necessary organisational and legal structure in order to pass provisions for whole Europe. It is specially significant in relation to Central and Eastern Europe.

99 Council of Europe, Computer Related Crime, 1990.

setting minimum standards in the member states for the protection of the environment through criminal law.[100]

The complexity or the putative complexity of existing conventions of the Council of Europe has prompted the Member States of the Community to explore the possibility of working out more simple intergovernmental arrangements for themselves regarding co-operation in criminal matters. In 1979–1980 the Member States of the Community considered proposals for a special extradition treaty. The negotiations held in the framework of the European Political Co-operation failed when it became clear that the then nine Member States were not able to go beyond the limits of the existing Council of Europe extradition treaty.[101]

In 1986 the Member States of the Community resumed negotiations regarding international co-operation in criminal matters. These negotiations have resulted, among other things, in the drafting of separate treaties on the transfer of criminal proceedings and on the transfer of enforcement of criminal sentences.[102] These treaties are, however, not considered to be replacements of the corresponding Council of Europe conventions but, rather, as instruments that should facilitate their application for states parties to the latter.

Today these simplified arrangements tailored to be available only for the Member States of the Community gained importance. Due to the ever continuing expansion of the Council of Europe to include new members, some of which have only limited experience with pluralistic democracy, some Member States became query whether the Council continues to be the most appropriate forum for the development of instruments promoting international co-operation in criminal matters. This cautiousness is mirrored in the Schengen Convention which was originally meant as a prelude to the lifting of the border controls of persons within the European Community. With regard to traditional international co-operation on the part of the judiciary, the Schengen Convention does not opt for separate, new arrangements but instead builds on existing conventions of the Council of Europe and the Benelux union dealing with extradition, mutual legal assistance, and the transfer of the enforcement of

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100 Draft Convention for the Protection of the Environment through Criminal Law, 21.06.1995 (Doc. Council od Europe DIR/JUR [95] 11).

101 SCHUTTE: *op. cit.*, 72.

102 Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, 13 November 1991; Convention between the Member States of the European Communities on the Transfer of Criminal Proceedings, 6 November 1990.

prison sentences. Hence, today Schengen represents the decisive form of co-operation which is demonstrated by the incorporation of the Schengen Aqui into the first pillar of the European Union.[103]

Despite any mistrust in the Council of Europe mechanism, the alternative offered by the Member States of the Community is not a communitarian decision making process of their own but merely a limited intergovernmental type of international co-operation. The only result produced so far which seems to be superior to those of the council of Europe is the above mentioned incorporation of the Schengen Aqui into the Treaty Establishing the European Union.

3. The Third Pillar and the issue of transfer of sovereignty[104]

The European Union was established by the Treaty on European Union which was eventually agreed and signed in Maastricht in February 1992 and entered into force on 1 November 1993. The most obvious feature of the Treaty Establishing the European Union was the institutional change it brought, establishing a three pillar structure with the Communities as the first of these pillars. The second pillar is the Common Security and Foreign Policy and the third one is the Co-operation in Justice and Home Affairs (JHA). The insertion of the Third Pillar into the Treaty Establishing the European Union marked a progression from numerous pre-existing initiatives, structures and frameworks in the field of European criminal justice co-operation.[105] Title VI was more than just symbolic for the increasing political consensus that international crime should be dealt with at a supranational level. In particular, its function has been to co-ordinate various initiatives in this field.

Art. K.1. of Title VI essentially demarcates the scope of activities and agreements which were included under Justice and Home Affairs. Included in the "matters of common interest" were judicial co-operation in criminal and civil matters, customs co-operation and police-co-operation "for the purposes of preventing and combating terrorism, unlawful drug trafficking, and other serious forms of international crime, including if necessary certain aspects of

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103 See more details in the next Chapter.

104 The TEU was modified on 19 June 1997 at the Amsterdam Summit of the IGC. At the time of the writing of this paper only a draft Treaty exists that awaits adoption by the Council in October. Therefore, this part of the paper is based on the TEU as was adopted in 1993 taking into account the draft modifications.

105 DEN BOER, M.: *Police Cooperation in the TEU: Tiger in a Trojean Horse*, Common Market Law Review, 1995, vol. 32, 55.

customs co-operation, in connection with the organisation of a Union-wide system for exchanging information within a Europol [K.1. (7-9)]." The Amsterdam Treaty considerably alters the scope of Art. K.1. Judicial co-operation in civil matters will pass into the European Community sphere, whereas police co-operation and judicial co-operation in criminal matters remain under Title VI though their scope is notably to be enhanced. The new Art. K.1, aimed at creating "an area of freedom, security and justice", has as its corollary the integration of the Schengen Aqui into the framework of the European Union. The Schengen Aqui is defined in an Annex as comprising: the Schengen Agreement itself of 1985, the implementing Convention of 1990, the various Accession Protocols and Agreements, and decisions and declarations adopted by the Executive Committee as well as acts adopted by the organs on which the Committee has conferred decision making powers. These changes made it necessary to rename the Third Pillar as "Provisions on Police and Judicial Cooperation in Criminal Matters" instead of "Justice and Home Affairs".

According to the new Art. K.3. common action in judicial co-operation in criminal matters shall include, *inter alia,* facilitating and accelerating co-operation between competent ministries, facilitating extradition between the Member States, preventing conflicts of jurisdiction between the Member States, and progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of organised crime, terrorism and drug trafficking. This provision, however, will not oblige as a consequence Member States whose legal system does not provide for minimum sentences to adopt them.[106] This provision should be welcomed since the original text of the Treaty Establishing the European Union provided only that Member States should consult with one another within the Council with a view of co-ordinating their action.

One of the changes brought along by the Treaty of Amsterdam is the new Art. K.6. replacing the former Art. K.3. According to the new provision the Council may adopt, acting unanimously on an initiative of any Member State or of the Commission, framework decisions which are binding on the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods, they shall not entail direct effect.[107] Framework decision is a new term in the Treaty, but the system it establishes

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106 Declaration to the Final Act on Art. K.3(e), Conference of the Representatives of the Governments of the Member States, 19 June 1997, CONF/4001/97, 33.

107 Declaration to the Final Act on Art. K.3(e), Conference of the Representatives of the Governments of the Member States, 19 June 1997, CONF/4001/97, 33.

simply codifies the case law of the European Court of Justice into the text of the Treaty. Member States are free in the future to choose between administrative law and criminal law when implementing framework decisions. The most important novelty of the new Treaty is that it extends the jurisdiction of the European Court of Justice to give preliminary rulings on the validity and interpretation of framework decisions, on the interpretation of conventions established under Title VI and on the validity and interpretation of the measures implementing them. However, the jurisdiction of the European Court of Justice is subject to a declaration made at the time of the signing of the Amsterdam act or any time thereafter by the Member State. This change is significant since pursuant to the old Art. K.3. (c) the European Court of Justice had jurisdiction only as regards conventions drawn up by the Council and only if such convention expressly stipulated it.

One *leitmotif* of the Amsterdam Treaty that sounds persistently throughout the draft is that closer co-operation cannot any longer be ignored. The novelty of the Amsterdam style flexibility lies in the insertion into the common provisions of the Treaty Establishing the European Union a practical flexibility clause complemented by similar provisions in the European Community Treaty and in Title VI. Closer co-operation is expressed in the new Art. K.12. replacing the former Art. K.7.

Art. K.9. (the *passerelle* provision)[108] is also to be changed considerably. The old text of Art. K.9. pertained to the competence of the Council to apply Art. 100C to areas under Art. K. (1) to (6), "and at the same time determine the relevant voting conditions relating to it". Müller-Graff has interpreted this as providing "a way for the Community to act in the areas of the third pillar even as far as they are not yet covered by the provisions of the European Community Treaty".[109] This could be done by a procedure whereby the Council acted unanimously on the initiative of the Commission or a Member States. The application of Art. K.9. to criminal justice matters was, however, theoretically excluded from this transfer, because it only concerned the old Art. K.1. (1) to (6). If the Council decided to change a "matter of common interest" into a Community matter, the Member States would have to adopt that "in accordance with their respective constitutional requirements, hence a ratification-like procedure similar to that of the enactment of amendments to the Treaties"[110]

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108 DEN BOER: *op. cit. Police Cooperation in the TEU ...*, 560.

109 MÜLLER-GRAFF, P.: The legal basis of the Third Pillar and its position in the framework of the Union Treaty, 31 CML Rev. 505.

110 MÜLLER-GRAFF: *op. cit.*, 508.

In other words, Art. K.9. offered the opportunity to avoid the Treaty amendment procedure which is set out in Art. N of the Treaty Establishing the European Union, but the procedure shows similarities to Art. N in that it requires unanimity at Council level followed by unanimous approval of all Member States. Some observers, however, saw the bridging provision of Art. K.9. as a Trojan horse[111]: They thought it could mean a hidden trick.

The *passerelle* provision had given academic commentators opportunity for speculation about the transfer of sovereignty in Justice and Home Affairs matters to the Community. Moving criminal justice competence to the First Pillar was a dynamic variable of interpretations about the extent to which normative authorisation should be given by a nation to a supranational entity.[112] The move towards integrating the field of international co-operation in Justice and Home Affairs into the institutional clockwork of the Community could have been read as a political manifestation of the growing willingness to link crime and criminal justice issues with other issues on the European agenda, such as health, education, employment and migration.[113] It was along this line of interpretation that the intergovernmental character of the chapter on Justice and Home Affairs was characterised as a potentially transitional by several commentators, in the sense that these issues could be in the future made into an integral part of the European Union.[114] This latter remark seems to be false and far too optimistic in light of the Amsterdam Treaty. The latter left judicial co-operation in criminal matters at an intergovernmental level. This is supported by the new Art. K.9. Under the new provision the Council acting unanimously on the initiative of the Commission or a Member State may decide that action in areas referred to in Art. K.1. shall fall under the Treaty establishing the European Community. Hence, the possibility of moving issues of judicial co-operation in criminal matters into the First Pillar remains dependent on the unanimous action of the Member States.

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111 The metaphor "Trojean Horse" originates from Mr V. Flynn, Security Liaison Officer of the European Commission.

112 MACCORMICK, D. N.: *Beyond the Sovereign State*, 56 Modern Law Review, 1–18.

113 DEN BOER: *Europe and the Art of International..., op. cit.*, 282.

114 DEN BOER: *Europe and the Art of International..., op. cit.*, 282. Pessimism about this process has been expressed by Schutte, who proclaimed that "hardly any new powers" has been conferred on Community institutions [SCHUTTE: *op. cit.*, 83]. O'Keeffe who was also sombre about this latter possibility believed, that "[O]ne conclusion to be drawn form the Union Treaty provisions and from the work programs on immigration and asylum is that one may be assisting at the start of a very slowly evolutionary process, whereby there may be a gradual transfer of competence to the Community" [O'KEEFFE: *The Schengen Convention: a Suitable Model for European Integration*, Yearbook of European Law, 1991, 216].

When analysing the structure of the Third Pillar it must be considered that the concept of transfer of sovereignty is itself controversial. According to Hay, it is the question whether the exercise of sovereignty by supranational organisations, such as the Community, actually represents a lessening of state sovereignty. Apart form characterising the link between the transfer of sovereignty and federalism as wholly conceptualistic, Hay admits that supranational organisations undoubtedly show "analogies to federal entities and in their supranational concentration of powers and powers in their indirect jurisdiction over persons living in the other member states".[115] The other more profound complication with the concept of "transfer of sovereignty" is that the supreme authority of the state and the primacy of national law over international law can only be considered as a juristic hypothesis,[116] or even "a fiction, when measured by the degree of actual interstate co-operation, factual interdependence, and reciprocal commitment".[117] Hence, the core of the problem must lie in the divergent interpretations about the extent to which authorisation should reach, and the extent to which competencies or new powers (not sovereignty) should be transferred or given to the Community.[118] As this interpretation is a variable of the political consensus that can be achieved between the parties, the concept of sovereignty can be considered as dynamic.[119]

One of the factors that might significantly influence the political consensus is the fact that as long as the internal market does not correspond with a uniform legal space the prosecution of cross-border criminality within the Community remains burdensome and ineffective.[120] The divergence between internationally mobile offenders and nationally limited crime prosecution questions the role of national states. Traditionally the legitimacy of democratic national states relied on the fact that they are able to guarantee individual freedoms to their citizens. This made necessary for the state to have the monopoly of force in order to protect its citizens from crime and interference with their personal freedoms. The sovereignty of national states stops according

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115 HAY: *Federalism and Supranational Organisations: Patterns for New Legal Structures*, 1966, 67.

116 KELSEN, H.: *General Theory of Law and State*, 1946, p. 383 et seq.

117 KELSEN: *op. cit.*, 382; GREVE, V.: *European Criminal Policy, Towards Universal Laws?*, de lege, 91.

118 HAY: *op. cit.*, 65.

119 HAY: *op. cit.*, 68.

120 SIEBER: *Memorandum für ein Europäisches..., op. cit.*, 369.

to international law at the national border.[121] Hence, the legitimacy of national states is newly questioned if these borders does not create any longer an obstacle for the commitment of crimes but rather for their prosecution.[122]

The partial transfer of sovereign rights did not only enhanced the emergence of new sorts of criminal activities but also—which is more important—it made more difficult with regard to the opening of the borders and the free movement of persons the persecution of traditional crime. More than anyone else, the law enforcement professionals throughout Europe would like to see more harmonisation between laws, to remove the legal technical barriers which they encounter in international criminal investigation.[123] There were several political compromises made in an attempt to resolve this situation[124] but Member States are not ready to consider the European Union as a regional model for the development of supranational justice.[125] It might sound a paradox; the only way to resolve the problems caused by the partial integration of the Community is to enter into further integration.[126] Even after the Amsterdam Treaty remains the quest that issues under Title VI should eventually be lifted into the core of the European Union, thereby federalising criminal justice matters that traditionally belong to the realm of national government.

V. Eurocrime

The Council of Europe has recommended a European Model Criminal Code as early as 1971.[127] However, at that time the discussion took a negative ending:

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121 For details on the connection between sovereignty and national territory see MACCORMICK, D. N.: *Sovereignity: Myth or Reality*, in: de lege (Yearbook of the Faculty of Law of the Uppsala University) 1995, 227, 233.

122 Not only the national state looses its power but its opponents are becoming stronger: Thus, internationally organised offender groups dispose of big financial means and are willing to use them in order to draw even more illegal profit. The weakness of the traditional national state is further emphasised by its lack of possibilities to control multi-national undertakings. Modern jurisprudence and sociology reaches the same conclusion on that topic. For further detail see: ARENDT: *vita activa*, 1960, 331.

123 DEN BOER: *Europe and the Art of International...*, *op. cit.*, 286.

124 SIEBER: *Subventionsbetrug und Steuerhinterziehung zum Nachteil der Europäischen Gemeinschaft*, Schweizerische Zeitschrift für Strafrecht, 1996, 357, 379.

125 SCHUTTE: *op. cit.*, 83.

126 SIEBER: *Memorandum für ein Europäisches...*, *op. cit.*, 371.

127 SIEBER: *Memorandum für ein Europäisches Srafgesetzbuch...*, *op. cit.*, 369. Despite the

there was not seen any advantage in the harmonisation of substantive criminal law.[128] Twenty two years later, in 1993, the Council of Europe put the issue of a model criminal code on the agenda again.[129] The reasons of an increased demand for international co-operation in criminal justice have been already elaborated above. However, the requirement of a closer co-operation in Europe does not justify automatically any specific form of integration.[130] Both historical experience and legal comparison demonstrate that cross-border criminality can be addressed in different ways.[131] There are basically two paths open for criminal policy in Europe: harmonisation or unification. The path of harmonisation consists either of bringing the existing categories together without suppressing the differences in doing so, or else consists of creating new categories which merely represent a broad framework and leave to each state a national margin of discretion as to how it should be applied. The other path available is that of unification. Unification tends to institute identical rules across the different countries. This approach is undoubtedly necessary to assure an equal respect for certain rights. In this area it will be necessary one day to go beyond mere harmonisation in order to arrive at the adoption of single criminal offences for which the constituent elements will be identical from one country to another.

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fact that the Community lacks competence to set supranational criminal law, both the European Parliament and the Commission has been supporting the idea of harmonisation in criminal justice matters. As regards the efforts of the Commission see JOHANNES, H.: *Neue Tendenzen im Strafrecht der Europäischen Gemeinschaften*, Revue International de Droit Pénal, 1971, 82. As to the European Parliament see European Parlaiment, Working Documents 1976–77, Report Drawn Up on Behalf of the Committee on Legal Affairs and Citizens' Rights on the Relationship between Community Law and Criminal Law, Rapporteaur: de Keersmaeker, Doc. 531/76.

128 ENSCHEDÉS: *Model Penal Code for Europe*, Council of Europe, AS/Jur (22) 45 March the 23rd 1971: "There is no special virtue of having uniformed penal laws." DANNECKER, G.: *Strafrecht der Europäische Gemeinschaft*, in: Eser/Huber: Strafrechtsentwicklung in Europa, 1995, 1991; DIEBLICH, F.: *Der strafrechtliche Schutz der Rechtsgüter der Europäischen Gemeinschaften*, 1985, Diss., 31.

129 Council of Europe Parliamentary Assembly, Motion for a Recommendation on a Model European Penal Code, Doc 6851 of 28th May 1993, ADOC6851-1403-25/5/93-4-E, No.14 subs.: "The Assembly recommends that the Committee of Ministers ... further instructs the CDPC to draft a European Model Penal Code and a Model European Code of Criminal Procedure...".

130 For more details see DELMAS-MATY, M.: *European Criminal Policy*, in: de lege (Yearbook of the Faculty of Law of the Uppsala University) 1995, 83 and 86.

131 SIEBER: *Europäische Einigung und Europäisches Strafrecht, op. cit.*, 957.

One example of a communitarian instrument on the interstate co-operation in criminal matters is the Convention for the Protection of the Financial Interests of the Community. It combines harmonisation in the crime field and unification in the administrative field. The Treaty was amended with a view to creating a common regime with respect to the criminal protection of the financial interests of the Community and the prosecution of infringements of those treaties. The Convention aims at, on the one hand, to require the Member States to fight infringements of the financial interests of the Community through penal measures in the same way as similar infringements of national interests were criminalised and, on the other, to regulate two forms of international criminal co-operation, namely the transfer of criminal proceedings and mutual assistance in criminal matters. The Convention established precise rules concerning the definition of fraud, the nature, extent and system of sanctions. Moreover, Art. 209A was inserted into the text of the Treaty imposing a duty on the Member States to take the necessary measures to counter fraud.[132] Art. 209A is to be altered by the Amsterdam Treaty. According to the draft, now the Council—and not only the Member States—should have the right to adopt measures in the field of the prevention and fight against fraud affecting the financial interests of the Community.

This suggests a move towards uniform criminal laws in Europe. However, as it was mentioned earlier, there are several possibilities for achieving it. The various models of co-operation differ from each other in the way how they distribute legislative functions and norm application between central and local bodies.[133] There are four basic models represented by the German, the Swiss, the US American and the North European systems of criminal justice. Their order is set in compliance with their degree of centralisation.

1. The German model (often seen as the example of uniform laws) shows a strong tendency of centralisation both on the level of substantive criminal law and on the level of criminal procedure. The priority of uniform federal criminal statutes over the criminal provisions of the *Länder* has been secured since the North German Federation.[134] Similar centralised systems exist in most of the Member States of the Community.[135]

2. The second model is the Swiss one which is a combination of uniform laws and of co-operation. It operates the same way as the German model as far

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132 MOOR: *op. cit.*, 21.

133 SIEBER: *Memorandum für ein Europäisches ... op. cit.*, 372.

134 Art. 2 (1) of the constitution of the North German Federation from 1867.

135 SIEBER: *Memorandum für ein Europäisches ... op. cit.*, 372.

as substantive criminal law is concerned, because since 1942 the federation has the competence to set substantive criminal law. On the contrary, criminal procedure is within the realm of the Cantons.

3. The third model, the US American one, is characterised by an even larger emphasis on decentralised elements. The historical background of this system goes back to the theory establishing the limited powers of the federation. Therefore, fifty different substantive criminal laws and criminal procedures are in force. The main difference between on the one hand the American system and on the other the German or the Swiss system is that in the US federal laws are applied by federal courts while the laws of the states are applied by state courts.[136]

4. The fourth and the most loose form of co-operation is the model of intergovernmental co-operation among sovereign states. It co-ordinates the mutual recognition of decisions.[137] This model is applied in the closely related Nordic countries.[138]

This brief outline demonstrates that co-operation is not limited to any certain model. In the following I will try to outline when and under which conditions harmonisation or unification is desirable or at least acceptable. With regard to substantive criminal law harmonisation does make sense. Whether it is necessary or not depend on the ability of national criminal law systems to cope with new types of crime.[139]

Harmonisation is indispensable in those areas of the special part where national crime control does not function any longer, or where there is a discrepancy between offenders operating on a worldwide basis and prosecution limited by national borders. It is specially true, for example, in the case of the dissemination of pornographic or racist materials in international data systems where national control systems are not any longer possible for technical reasons.[140] Furthermore, harmonisation is also highly desirable in areas where activities carried out in one country directly effect other countries and cannot be controlled effectively through national borders. This concerns other computer related crimes, environment-related crimes, business crimes (especially in the sphere of international trade in goods, services and capital), the cross-border trade in illicit drugs and finally international terrorism. Furthermore, economic

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136 SCHMIDT: *Das Amerikanische Strafverfahren*, 1986, 23 and 88.

137 SIEBER: *Memorandum für ein Europäisches ... op. cit.*, 373.

138 See Helsinki Agreement Concluded between Denmark, Sweden, Finland and Norway on 23 March 1962.

139 SIEBER: *Memorandum für ein Europäisches..., op. cit.*, 374.

140 SIEBER: *Memorandum für ein Europäisches..., op. cit.*, 374.

analysis demonstrates that differing standards in criminal law may distort competition.[141] This has repercussion for example concerning the distribution of food where the different national food-related provisions hinder trade.[142]

Also with regard to legally protected supranational rights like the financial interests of the European Community[143] harmonisation is sensible. The reason is the same as it is for the prosecution of crimes against humanity. Since the offenders are often not prosecuted on the basis of their national laws, international standards are necessary.[144] Fields where the lack of harmonisation could lead to the emergence of crime heavens deserve special attention[145] as we have seen it in relation to multinational enterprises which operate usually in countries with a lower niveau of protection.[146]

In all of these areas there is need for harmonisation in the near future. Therefore, they will become in the long run the pioneers of European Community Criminal Law. On the contrary, with regard to other traditional crimes like homicide or theft[147] harmonisation of substantive laws is not pressing. Nevertheless, harmonisation could make international co-operation easier. One aspect of the latter is the mobility of lawyers that could be promoted through uniform laws.

On the other hand, it is not desirable to embark on harmonisation in fields in which real cultural or historical differences exist. However, it must be thoroughly examined whether national differences in criminal law are actually based on peculiarities or simply are the result of political contingencies of legal development.[148] Thus, for example Greve enumerates the following provisions

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141 ZULEEG: *op. cit.*, 41 and 46.

142 DANNECKER, G.: *Strafrecht der Europäische Gemeinschaft*, in: Eser–Huber: Strafrechtsentwicklung in Europa, 1995, 70; Dir. of 29 June 1992, OJ C228/24.

143 WEIGEND, R.: *Strafrecht durch internationale Vereinbarungen–Verlust an nationaler Strafrechtskultur?*, Zeitschrift für die gesamte Strafrechtswissenschaft, vol. 105, 1993, 774 and 798.

144 SIEBER: *Memorandum für ein Europäisches..., op. cit.*, 375.

145 JUNG, H.–SCHROTH, H. J.: Das Strafrecht als Gegenstand der Rechtsangleichung in Europa, GA 1983, 241, 251.

146 SIEBER, U.: Der strafrechtliche Schutz der Information, in: Tiedemann, K. (ed): *Multinationale Unternehmen und Strafrecht*, 1980, 155, 172; WEIGEND: *op. cit.* 774 and 784. ("Oasen der Straflosigkeit").

147 Some scholars are of the opinion that the Member States should achieve a wider consensus in this field. See Jung/Schroth, Das Strafrecht als Gegenstand der Rechtsangleichung in Europa, GA 1983, 241, 255.

148 GREVE: *op. cit.*, 91 and 93.

as culturally different: abortion laws (which are in Scandinavia much more liberal than in Germany),[149] euthanasia (which is under strict circumstances permitted in Holland while in Germany is basically prohibited), laws concerning alcohol consumption (which are particularly strict in the Nordic countries), drug laws (which are more relaxed in Holland than elsewhere in the European Union), bigamy of homosexual partners (what is considered as bigamy in Denmark would be unimaginable in Greece), criminalization of the so called "Auschwitz Lüge" [i.e. the denial of the Holocaust] (which is a crime under German law but is protected in most of the European Community countries in the framework of free speech). In culturally such different areas any attempt of harmonisation will take much longer, until the integrated European Union leads to a closer identity and European culture. However, it is clear that the total conformity of national cultures in Europe is neither desirable nor expectable. Since criminal law serves only as an *ultima ratio* and ensures an "ethical minimum", it is possible to reach a much wider consensus in criminal law than in any other laws. Therefore, we cannot exclude the possibility that a European Criminal Code might incorporate even these areas.[150]

As it has been already mentioned earlier, the emergence of supranational criminal law could be promoted by harmonised criminal procedures besides harmonised substantive criminal provisions. This is so, since the application of the law even that of uniform provisions within the European Community is left to the national authorities. With a view to the compulsory authorisation and powers in criminal procedure the necessity of harmonisation is great. An example of it is the ECHR which guarantees human rights in criminal proceedings throughout Europe.

Such harmonisation may improve the co-operation of authorities involved in prosecution, too. It is also a prerequisite for the emergence of a European legal space. The traditional way of co-operation among prosecution authorities is based on their territorially limited powers and limited effects of their decisions which become effective in other sovereign territories only via the mechanism

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149 WEIGEND: *op. cit.*, 774 and 788.

150 Greve points to the classic distinction within criminal law made between *mala in se* and *mala prohibita*. There are evil acts that will always be crimes while other acts are forbidden for political reasons in certain periods and in some areas, for example, acts included in fiscal law, in business law, in traffic law, etc. Greve argues that this classification could make it natural to let *mala in se* crimes to form a part of a common law book, decided upon in Brussels. GREVE: *op. cit.*, 98.

of mutual recognition. In contrast, the harmonisation of criminal procedure could make it possible to extend powers with regard to territory and the immediate application of foreign judgements as it is the case in federal states.[151] On the basis of a uniform European system for the protection of legal positions the question emerges whether it is possible to have a Europe wide search order so that one can forget the circumstantial legal assistance.[152]

On the other hand, there is no need to harmonise solely technical provisions of criminal procedure. Criminal prosecution in Europe is tied to cultural and historical evolution like e.g. the difference between the continental European *ex officio* persecution and the Anglo-American adversarial system. There are serious reasons to retain these features.

The weight of these arguments would support rejection of common criminal legislation in the core areas closely intervened with ethics until a common culture has developed. In ethically neutral areas it is desirable to try to remove actual differences and create greater compatibility between the national legislations.[153]

VI. Conclusion

If one is talking about European Community Criminal Law, there are three orders of difficulties which have to be faced; these are political, legal and technical. The real issue, however, behind this discussion is what degree of convergence can be achieved in respect of a particular subject matter. How best can regulation be achieved. Although the Member States face common problems and adopt rather similar values, they do not have a harmonised system of criminal law. This is partly so because of the constitutional reference to sovereignty, and partly because of legal dogma. The most notorious problem concerns the criminal liability of enterprises.

There are essentially two recourses open to protect the interests of the Community. One is to try to provide parallel and as nearly as possible identical criminal norms or administrative penal norms in each of the Member States. In order to resolve any difficulties that might arise one has to rely on co-

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151 The need for co-operation in matters of criminal procedure can be used as an additional argument for the harmonisation of substantive law. The willingness to give up sovereign rights could be increased if the substantive law is similar in the different countries.

152 SIEBER: *Europäische Einigung und Europäisches..., op. cit.*, 957, 962.

153 GREVE: *op. cit.*, 111.

operation. This is what the Treaty of Amsterdam aims at. The second is, to try to develop a European criminal law on a Community wide basis. There is a clear but differentiated need for unification of national criminal laws in the various areas of law. The development of a legally non-binding model criminal code would support all possible forms of co-operation by a rather soft means. It would especially allow for the recognition of cultural differences. It would also enhance the revision and systemisation of national criminal laws and be of great help for states which are newly emerging or which want to turn to a more democratic criminal policy.

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Lajos RÁCZ

Cardinal Serédi and Relations between Hungarian State and the Catholic Church

"The incumbent Pope devotes all his time to the spiritual life of the Church and deals with politics only to keep it away."—wrote Baron Apor, the Hungarian Envoy to the Vatican on Pope Pius XIIth.[1] The same words apply to Jusztinián Serédi as well. Cardinal Jusztinián Serédi (whose original name was György Szapucsek)[2] was born in 1884. He was an outstanding scholar of canon law, Primate of Hungary and Archbishop of Esztergom. The comparison with Pope Pius XIIth is also meaningful, as they governed the Church at the same time, though on different levels. It was a very special time in history, as the Church

1 The official statement of the Envoy dated of 1 June 1939, see in: *Documents of the Relations Between the Vatican and the European Fascist Regimes.* Compiled by Zs. B. LŐRINCZ, Budapest, 1969. (below referred to: *The Hungarian Envoy to the Vatican.* 1969) 168. Apor criticises the former pope, Pius XIIth: "The deceased pope was deeply engaged in politics. Being a power-thirsty man, he got involved in affairs not closely related to the Church, and with too much vehemence." Concerning Baron Apor, Envoy to the Vatican, see: B. LŐRINCZ, Zs.: *op. cit.* Preface: 18–19.

2 MESZLÉNYI, A.: *The portraits of Hungarian prince-primates.* Budapest, Sz. I. Társ. 1970. from 394. The parents of Serédi were Mihály Szapucsek and Júlia Oroszlán, who lived in Deáki in Kisalföld. The father's ancestors come from County Árva. György Szapucsek was born on 23 April 1884 to be the tenth child of the family. His brothers, among them there are a Benedictine monk, a railwayman, change the family name for Serédi which sounds more Hungarian. György changes his name when he is in the sixth grade of the school. He becomes a novice in Pannonhalma on 6 August 1901. His name in the Holy Order is Jusztinián.

had already been deprived of its secular power and it was forced to focus on its spiritual life. On the other hand, for the sake of the universal Church the Pope could not turn from politics, which occasionally involved his necessary participation, even if his office was confined to the Vatican.

In case of Serédi, an inevitable political activity can be mentioned, because there seems to be a clear difference between the political activity of János Csernoch, the Primate's legal predecessor and Serédi's determined but always tactful political steps. Csernoch actively participated in the political stabilisation of the new Government from the very beginning of the Horthy era. For example, Csernoch persuaded Charles IVth, the former Habsburg Emperor of Austria and King of Hungary, to leave the country after that his first attempt to return to the throne by way of a coup failed in 1921.[3] In comparison, Serédi had not been seriously involved in politics till István Horthy, the elder son of the Regent, was elected the Vice-Regent of Hungary.[4]

This difference between the two successive Primates of Hungary in political attitudes and style is explicable, as János Csernoch was enthroned to pontificates (Archepiscopal See of Kalocsa, then Esztergom) in the palmy days of peace of the Austro–Hungarian Monarchy when pontificates were predestined to participate actively in politics according to the contemporary public law.

At the same time, Serédi was appointed to the first pontifical see of the State a decade later after the Peace Treaty of Trianon, when a lot had been changed in the relations between the State and the Church. Although the public lawyers still considered the right of coronation of the Archbishop of Esztergom effective, it became obvious after the royal coups that this privilege was just a fact of legal history, and not a real authority.

It must be mentioned the Catholic Church could survive the World War I with big losses, which meant significant losses in both the number of believers and territory, not to mention its possessions. Among the remaining and maimed dioceses, Esztergom became the most affected beside Szatmár and Várad. Perhaps it was only for Budapest, subject to Esztergom Archepiscopal See, and its increasing number of believers to be ministered that Esztergom did not become a vicarship. This situation, as in the above-mentioned case of

3 CSIZMADIA, A.: Az állam és az egyházak jogi kapcsolatának története a Horthy korszakban. Budapest, 1966. 130. footnotes 5; 6. About the Primate's personal account see: BEKE, M.: *History of the Hungarian Episcopal Conference and its Protocols. 1919–1944.* Volumes I–II, Munich–Budapest. 1992. Volume I, 77.

4 MESZLÉNYI: *op. cit.*, 424–433.

Csernoch, could inevitably invite the interest of the Esztergom See. But Serédi, and it demonstrates his intellectual calibre if not political talent, resorted to steps in inner politics only if it was inevitable.

Serédi's political career is mostly still unexplored. So far, only general historiography has undertaken to publish his memoirs, while his character is still a blank spot for church historiography.[5] This also implies that up to the present, the available archivalia are the most revealing about Serédi's period of Primate. Research based on these materials indicate some interest, though.

I shall not present results of new research here; instead, I would like to make a review of the state of the research, encouraged to do this, as a legal historian, because Serédi's political steps as a Primate and his general attitude are infiltrated with the outlook of a lawyer.

We grouped Serédi's church and inner political activities around the following criteria:

1. The question of the appointments to pontifical sees and the *Intesa semplice*.
2. The detached dioceses; ministering the Hungarian flock beyond the border.
3. The Church's legal position after reannexation.

However arbitrary the above criteria may seem, considering the available research, they can be discussed from a legal point of view. It must be admitted, though that the conclusion of our paper cannot pretend to be more than what Baron Apor (cited in the motto) would often say in his official statements: "relata refero"—I tell what I heard from others.

1. Serédi and the Intesa semplice

The political career in the church of Jusztinián Serédi, a Benedictine monk started when he went to Rome. He built a very good working relationship with Cardinal Gasparri, the powerful superior of the Papal Court during the codification of *Codex Juris Canonici*.[6] By the end of the war he was back at

5 *The Memoirs of Serédi Jusztinián. 1941–1944.* Published by: ORBÁN, S. and VIDA, I., Budapest, 1990.

6 MESZLÉNYI: *op. cit.*, 400–401. The data suggest 10.500 legal sources in 26.000 excerpts were processed. He stored up this material till his death, and docketed them at the end of his life.

home, and according to certain sources, on 2 January 1919 Primate Csernoch called upon Serédi to go to Rome and inform the Holy See about the state of affairs in the Hungarian Church.[7] No doubt, it was his excellent connections with Rome that made the Primate choose Serédi. When the Hungarian Mission in the Vatican was established, Serédi soon became the canonist of the Mission.[8] At the same time, he carried on with the refinement of *Codex Juris Canonici*, and he and Gasparri continuously published that huge pile of documents that they collected during the preparation for the codification.[9] This way Serédi kept up friendly relations with both sides: on the one hand, with the Holy See because of the codification; on the other hand, with the Hungarian Government for giving legal counsel to the Mission in Rome.

The Government in power at that time did really need canon law counsel, it could even use Serédi's connections in the Papal Court. It was important when the anomalies about the right of patronage became one of the most acute church political problems in Hungary. After the *Codex Juris Canonici* came into force in 1918, the Vatican tried to enforce the provisions of *Codex Juris Canonici*, like, for example the centralisation of church power. This endeavour is reasonable, as the Church, being confined to the Vatican State, had only legal means at its disposal to maintain its universal pretensions. As the Codex authorised solely the Pope with the right of appointing bishops, it was only reasonable of the Holy See to try to eliminate all legal customs, privileges or pacts contradicting this provision of the Codex.

It should be mentioned that at the beginning of the 1900s, only the Spanish[10] and the Hungarian Monarchs in Europe were fully authorised to practise the power of appointing bishops, beside the German Chancellor who had this power only in some parts of the Empire. These exceptions could be justified by certain church, or geopolitical concerns, of course. Both the Hungarian and the Spanish Kingdom represented a political border and a

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7 *The Hungarian Envoy to the Vatican.* 1969, 12, footnote 4. Meszlényi does not know about this commission. According to him "He did not expect a new invitation from Gasparri, instead he travelled home as soon he could." (see in: MESZLÉNYI: *op. cit.*, 403).

8 MESZLÉNYI: *op. cit.*, 392, 404 and BEKE: *op. cit.*, Volume I, 59. From the minutes of the Episcopacy dated of 27th October 1920: "Jusztinián Serédi a Benedictine friar was appointed to the post of church counsellor. He is a capable of serving as the Agent of the Hungarian Dioceses at the different offices of the Holy See ... Serédi is asked to accept this post."

9 MESZLÉNYI: *op. cit.*, 403. He worked on the sources in 1923–1938. It was published in nine volumes in co-operation with Gasparri. After his death he was the sole publisher of the *Codex Juris Canonici Fontes.*

10 *The Hungarian Envoy to the Vatican.* 323.

defence line towards the two big rival religions. Spain bordered with the Muslim World, while Hungary had been the faith defender against Orthodoxy for about a thousand years. Obviously, in this exceptional political position church was rewarded with these legal privileges.

The Kingdom of Sicily had its privileges for similar geopolitical reasons some time earlier. The King of Sicily, as Monarchia Secula and a secular subject, laid claim to a papal legate authority, similar to that of the Archbishop of Esztergom. Philip IInd of Spain, for example was more than ready to practise the highest jurisdiction in church affairs, notwithstanding the protests of the Papal Legate.[11] What is more, the court proceeding on his behalf consisted of secular and not church lawyers.

Considering the above, Rome waited only for the opportunity to abolish these exceptions. The political instability following World War I came at just the right moment, and a general papal right of appointing bishops seemed to be desirable for the interest of stability.[12] In Hungary, this possibility arose at first in 1919–20, in connection with the vacancy in the Episcopal See of Vác. Rome, referring to the anomalies concerning the powers of the Head of the State and the instability in domestic political life, appointed its own candidate to the Vác See without consulting the Hungarian Government. (N.B. it is remarkable that Rome was not affected by Primate Csernoch, who advised the Legate functioning in Vienna to postpone the appointment.[13]) This precedent shocked, at the same time frightened the Hungarian Government.

Following this, every Hungarian Government did its best to agree with the Vatican on a solution for the problem of pontifical appointments, which also involved the question of the right of patronage. Before a detailed government plan could have been drafted, the vacancy in the Kalocsa See brought about a new problem. This made the Government resolve to finally settle the question. Then, in the conferences with the Holy See, Serédi appears as a mediator intermediating between Under-secretary Cardinal Gasparri and the Hungarian Mission.

Beside Csernoch's political talent Serédi's opinion seemed to be authoritative in these negotiations in the Vatican. This suggestion is reasonable if considering that the debates about the candidates to the Kalocsa See sharpened so much that one should have expected the open reprehension of the

11 KOENIGSBERGER, H.: *The Government of Sicily under Philip II of Spain.* London, 1951 from 145 and CSIZMADIA: *op. cit.*, 263.

12 CSIZMADIA: *op. cit.*, 134, 268, footnote 21.

13 CSIZMADIA: *op. cit.*, 269–270.

Vatican. It was well-known that Gasparri sometimes tended to be vehement. Nevertheless, whenever the Hungarian Mission excuses for its mistakes, the Vatican's reply is always friendly and lenient. This was probably for Serédi's mediation, whose opinion in church law after his successful codification was authoritative for the Vatican administration.[14] Slightly exaggerating, we can state that owing to Serédi's popularity the Vatican was more lenient with the Hungarian Government, which sometimes had vehement, though compromising intentions.

Other sources also suggest that Serédi's participation in the accomplishment of *Intesa semplice* (1927), a provisional pact, was determining. This document, even if provisionally, regulated the question of appointing prelates between the Vatican and Hungary. The benevolence and sympathy of the Hungarian Government towards Serédi also suggests Serédi's special role. No wonder the Vatican jumps into the false conclusion that Serédi can be appointed to the vacant Esztergom See without consulting the Hungarian Government.[15] Well before Serédi's appointment to archbishop, Count Sommsich, the Hungarian Envoy to the Vatican through Gasparri urged the Holy See to reward Serédi for his merits in the codification.[16] (N.B. Serédi was on the Government's list of candidates for the vacant see in the Székesfehérvár Episcopal See in 1925.[17])

The creation of *Intesa semplice* was something to be proud of for Hungarian church politics. If one carefully studies the contemporary map of church politics in Europe, the following can be noticed. In Germany, at first the Vatican made separate concordats with the Lands to regulate pontifical appointments. The most important of these are the Bavarian and the Prussian concordats which were effective even after the conclusion of the Imperial Concordat, resulting in a kind of dual regulation.[18] According to the Prussian Concordat, collegiates, and not the Chancellor who had a right of appointment, had a right of veto against the Vatican candidates to the traditional imperial sees.[19]

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14 MESZLÉNYI: *op. cit.*, 405. Serédi's authority was also underlined by the information of Envoy Barcza according to which the Vatican asked the Primate canonist to co-operate in the codification of the Italian Concordat (1929), created not much later. See in: *The Hungarian Envoy to the Vatican.* 133.

15 CSIZMADIA: *op. cit.*, from 315; and MESZLÉNYI: *op. cit.*, from 405.

16 MESZLÉNYI: *op. cit.*, 1970, 404. Gasparri' reply: "Do not worry. You will be rewarded."

17 CSIZMADIA: *op. cit.*, 304; and MESZLÉNYI: *op. cit.*, 405.

18 *The Hungarian Envoy to the Vatican.* 210–212, 214.

19 The important examples are in: CSIZMADIA: *op. cit.*, 301, footnote 2.

The Spanish situation is interesting, too. After the provisional cessation of the Monarchy, the Vatican denied the Republic the right of appointment practised by the former monarchs, although it recognised the new regime.[20] Later, after long delays the Vatican made a new concordat with Franco. The Holy See agreed that the Spanish Head of State presents a suggestion of six candidates to prelates. The Vatican selected three of the six candidates, the Spanish Government put these names in an order of preference and sent the list to Rome for a final decision and appointment. But, as Baron Apor, the Hungarian Envoy to the Vatican put it: "this privilege to Spain was a pure formality; in reality, the situation was the same as in our county or many other countries".[21]

Viewing it in its European context, *Intesa semplice* was a big success. On the whole, its rules conform to the similar Vatican pacts. However, among others, there is one big difference. In the above-mentioned examples they solved the problem with a concordat, while in the case of Hungary, both sides agreed on a provisional pact. True, this provisional pact proved to be a better solution than some of the concordats. Perhaps, we are not far from truth if we suggest that Serédi had his part in realising this modus vivendi, as that largely reflects the special circumstances in the Hungarian Church. The Holy See could have that kind of information at its disposal only if somebody provided them. Among others, one such confidential piece of information from the field of church politics was that Hungary was not interested in concluding a final pact. (N.B. it is also of interest and suggests a special treatment of Hungary that Hungary has not had a single concordat with the Vatican, as contrasted with other states.)

It is important to note that *Intesa semplice* came into force at about the time of Serédi's primacy. At the same time, behind the procedural form of the Pact there is a complicated political decision making machinery. According to the Pact, the Hungarian Government could select three candidates for nomination to vacant prelacies. The Vatican chose from these, but had it chosen someone else, the Government could have vetoed against this candidate. In the case of nominating army bishops, the Vatican provided further cessions, as the Government was entitled to make further complaints beside political objections.[22] An important achievement was that the Vatican was not entitled to complain about political vetoes.

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20 *The Hungarian Envoy to the Vatican.* 318.

21 *The Hungarian Envoy to the Vatican.* 322, 347–352.

22 CSIZMADIA: *op. cit.*, 305–309.

In reality, a whole range of influential persons were involved in the nomination of candidates. In case of Sedes vacantia, depending on the importance of the see, the Prime Minister or the Minister for the Cultural Heritage conferred with the Primate. The Primate consulted the Papal Legate, but occasionally the P.M. contacted the Papal Legate. Then, after an agreement on the candidates, the Foreign Minister informed the Holy See through the Hungarian Envoy. The negotiations in Rome went on in the Mission–Foreign Ministry–Primate–Papal Legate circle.

It is not without significance to write about the legalisation of the above-mentioned circle. The research of Professor Csizmadia suggests that P.M. István Bethlen dealt with the issue in a conference on church politics on 9 July 1925. Then the spheres of authority were clearly defined. Generally, the Foreign Ministry was to initiate negotiations with the Vatican, but the Minister for Religion and Education was to decide in church political issues. In the most important questions the P.M. was to make decisions. It was also declared that the Minister for the Cultural Heritage as a private person is also entitled to contact the Papal Legate. The bishops can also contact the Papal Legate, as well as the Vatican.[23]

Neither *Intesa semplice*, nor the above *Government decree* on the definition of spheres of authority in church politics states that the Primate should be involved in negotiations at any level. Oddly enough, Primate Csernoch, who participated in the preparation of *Intesa semplice* at home, noticed this deficiency only in the last minutes. He immediately asked the Minister for the Cultural Heritage to intervene in Rome in the interest of codifying the primate rights.[24] However, the Holy See turned down this request. The reasons for the denial can only be guessed. As it was only a temporal pact, Rome perhaps did not want to cause the Primate inconveniences by prescribing the obligatory negotiation. Every soberly thinking government would consult the Primate anyway. (N.B. Csernoch refers to the fact that at the time of the Austro-Hungarian Monarchy the Monarch consulted the Primate in each pontifical appointment.) Another explanation is that Serédi participating in the negotiations and refining the text of the Pact with Gasparri did not realise the significance of primate powers.[25] These questions remain to be answered. The fact is that Csernoch's worries about Serédi's primacy did not prove to be

23 CSIZMADIA: *op. cit.*, 298.
24 CSIZMADIA: *op. cit.*, 307–308.
25 CSIZMADIA: *op. cit.*, 302–303.

right, any government in office would always and regularly consult the Primate in case of a vacancy.[26]

Serédi had a strange routine in episcopal appointments. He was a canonist, therefore he might have sympathised with fellow canonists more than theologians. It can be observed that in the second half of his primacy there were more canonists among candidates to bishops. Even Rome noticed it. When the Government again offered Ferenc Luttor, the canonist-lawyer of the Hungarian Mission to a prelacy, the Vatican firmly stated that since the appointment of Serédi it was decided the Holy See did not want to see any more canonists of the Mission in a prelacy.[27] However, some canonists residing at home were appointed to a bishop, supposedly due to Serédi's good diplomacy. Slightly exaggerating we could suggest that this was the practice till the inauguration of József Bánk to the Eger, later the Vác Sees.

2. Serédi and the dioceses of Trianon

Serédi's appointment to primacy, which took place without consulting the Hungarian Government, was commented on by Barcza, the Hungarian Envoy to the Vatican: "the Vatican wishes candidates to prelacies who are highly disciplined, loyal to the Church and ready to represent the will of the Holy See and insist on the regulations of the canon law".[28] This latter quality, an insistence on canon law is important to note. This was significant not only for the implementation of *Codex Juris Canonici*, but also for the reason that the majority of Hungarians residing over the new borders were Catholics. These facts and the problems of church organisation related to them resulted in a plenty of questions concerning international law. Not to mention the situation in the Esztergom diocese where 90% of its territory and a large proportion of the assets of the Archiepiscopal See became the property of Slovakia.

Serédi got involved in these issues even at the time of his staying in Rome. He, being good at languages often translated for the new minority Hungarians visiting the Vatican. One of his biographers mentioned that once when he translated to one such delegation at a papal audience, Pius XIIth smiling said

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26 CSIZMADIA: *op. cit.*, 331, quotes Envoy Barcza's opinion about a complicated episcopal appointment (1933) which suggests Serédi's proposal to postpone the appointment should be heeded, as "we could not propose any appointment without the Primate's consent".

27 CSIZMADIA: *op. cit.*, 339.

28 CSIZMADIA: *op. cit.*, 321.

to Serédi: he does not understand that some days before Serédi interpreted for a Slovakian pilgrim delegation, the day before for Yugoslavian visitors, and now for a Rumanian delegation. "Does everybody speak Hungarian there?"—asked the Pope benevolently.[29]

Returning home from Rome as Primate and the Head of the Hungarian Episcopacy he had to deal with problems following from the new situation.

At the end of World War I, two Hungarian bishops from Felvidék offered their service to the Vatican, still they had to leave their sees. At the beginning of Serédi's office, they were still alive in Hungary (N.B. they were honorary archbishops).[30] Some of the bishops serving over the border had a good relationship with the Hungarian hierarchy. For example, the saintly Ágost Fischer–Colbrie, Bishop of Kassa; Károly Majláth, Bishop of Transylvania; his successor, Áron Márton, to mention a few. Both Rome and the Hungarian Government were of the opinion the bishops in service over the *Trianon* borders should not be appointed to the vacant Episcopal Sees in Hungary because of concerns for the flock living outside the state. There were worries that other prelates would also claim to come home to Hungary.

The stand of the Hungarian Government is explicable, but Rome's rigidity could be explained by the Pope's character. Mr. Barcza, the Hungarian Envoy to the Vatican, in his official statement dated of 1931 in detail discusses the dawn of republican movement in Spain and the place of the Church in it. He mentions, among other things, how much the Vatican was shocked when Seguera, Archbishop of Toledo ran away from Spain to the Vatican at the beginning of the Revolution. Barcza writes: "When the Soviet troops were at the outskirts of Warsaw, Pius XIIth, then the Papal Legate to Warsaw, was the only person of the diplomatic corps who did not leave his mission. He really got furious when he heard about Seguera's flee ... the Holy See rejects this behaviour—continues the Envoy—not only for moral reasons, but because they think that the official concerned loses his moral superiority if he does not wait until he is forced to leave his mission. Beside Cardinal Seguera there were some other bishops who left their mission, probably not because of open violence. This did not strengthen the authority of the Church in Spain. The Hungarian bishops who did not escape during the Soviet Republic in Hungary in 1919 were mentioned as good examples!"[31]

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29 MESZLÉNYI: *op. cit.*, 404.

30 BEKE: *op. cit.*, Volume I from 39, 44–48, particularly 68.

31 *The Hungarian Envoy to the Vatican.* 320–321.

The viewpoint of the Vatican in issues like this remained standard. In 1939, when the Soviet attacked Poland and the Polish Primate fled from Posen, the Holy See sent him back to his diocese despite an invitation by the Polish government to Paris. Apor, Hungarian Envoy to the Vatican wrote in his official statement: "Cardinal Maglione pronounced that a bishop is to remain in his diocese in whatever circumstances".[32]

Other envoys in their statements underlined the importance of the *Imperial Concordat with Germany* dated of 1933. Masirevich, German Envoy from Berlin emphasises the significant 29th Passage of the Concordat: "...the German Government assumes an obligation to guarantee the ethnic minorities of Germany a treatment based on the principle of reciprocity in their religious life. In the relevant passage of the concluding protocol the Holy See expresses its intent to consider a similar protection of German minorities in concordats to be concluded in the future".

Oddly enough, the Hungarian Mission in the Vatican, warning the Foreign Ministry referred to the same passage: "The 29th Passage is of special interest for Hungary, as that provides the same rights to a minority living in Germany as the home state of the given minority guarantees Germans living in its territory... The regulations of the *Signature Protocol* state the Holy See will assume an obligation to make sure (Bedacht nehmen), in accordance with the principles they respect, that in the interest of the German minorities a similar regulation be made in concordats to be concluded with other states. This expressed principle of the Vatican will be a feasible point of reference in the interest of Hungarian minorities."[33]

The above documents seem to support the sayings according to which Primate Serédi well before the *Vienna Arbitral Award* of 1938, made preparations—with the help of the Vatican—for an agreement with the Czechoslovak State. This agreement would have considered the above—mentioned principles of reciprocity in the life of the ex-Hungarian dioceses in Felvidék, and it suggested the principles of parity in allocating church offices. The Hitler regime, after it became politically strong, would continuously breach the *Imperial Concordat.* This did not influence the Vatican which since that time has considered this democratic and modern treatment of ethnic minorities its own. It is very probable that Serédi, who had excellent connections with the Vatican, might have had the silent consent of the Vatican in his efforts to solve the problems

32 *The Hungarian Envoy to the Vatican.* 287.

33 *The Hungarian Envoy to the Vatican:* Report of Masirevich 214, Report of Thierry, Agent of the Vatican, 212.

of the church in the newly-created states of *Trianon* on the basis of reciprocity. It is remarkable, for example, that in the middle of the 1930s, the Vatican, after the Hungarian Government intervened, did not confirm the non-Hungarian candidates of the Rumanian Government to the Episcopal Sees of Várad and Szatmár.[34]

This favourable trend was stopped after the unexpected decisions on territorial revision in the *Vienna Arbitral Awards* of 1938 and 1940. The tactful and considerate Serédi was not prepared for the changes in church administration following the border revisions. Supposedly, he might have expected the realisation of the draft he had been preparing, rather than a quick political decision which resulted in a late correction of the *Treaty of Trianon*.

According to the records from the conferences of the Hungarian Episcopacy, one of the biggest problems of Serédi was the normalisation of relationships with the formerly detached dioceses. He, characteristically, did his best. One of the signs of his good will was that, not long after the implementation of the *Vienna Arbitral Awards*, he invited the bishops of the returned dioceses to the conference of the Hungarian Episcopacy.[35] The co-operation which at first seemed to be peaceful soon ended.

At the conference of the Hungarian Episcopacy in 1940, the Uniate bishops of Transylvania particularly opposed the Primate. The legal arguments motivating the political-ethnic conflicts are very interesting. The Uniate bishops had some legal reservation in the debate concerning the jurisdiction of the Primate. They said they regarded their participation at the Hungarian Episcopal Conference as a sign of their respect for the Primate, but the canon law does not oblige them to do so. They argued the Pope exempted them from the authority of the Esztergom Archbishopry at the foundation of the Fogaras–Balázsfalva Archbishopry, and subordinated them to himself. In his reply, Serédi, the canonist claimed he had the authority of a legate, which implies papal authorities, consequently they could not be exempted.[36]

Then, during the debate it came to light the Uniates had a lot of real and presumed injuries, and the disagreement about the authorities was a symptom of the antipathy the governors of the Uniate Church in Transylvania felt about the territorial revision. Nevertheless, there was no time to harmonise the Hungarian Catholic hierarchy which extended in number out of necessity, in

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34 CSIZMADIA: *op. cit.*, 336 and footnote 31.

35 BEKE: *op. cit.*, Volume II, 217, the Primate's announcement of the territorial changes in the minutes of the Hungarian Episcopacy.

36 BEKE: *op. cit.*, Volume II. 247, 289, particularly 292–294.

a relatively short time. World War II and the unexpected death of Serédi stopped the further debates about church authorities.[37]

37 MESZLÉNYI: *op. cit.*, 1970, 433–434 and BEKE: *The History of Hungarian Episcopacies and its Minutes 1945–48.* Cologne–Budapest, 1966, 28, where the presiding Archbishop of Eger, Czapik, commemorating Jusztinián Serédi said: "The Lord sent for him on Holy Thursday (29th March) at noon."

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Csaba VARGA

Measuring through Patterning in Law

Development of an Idea in Europe

In the following we will lay particular stress on the development of thoughts relating to the ideal of law, throughout which the measure gains full independence in its use as a legal instrument. Therefore, we will not touch upon issues of technical development of the legal instrumentalities, although in a number of related cases and cultures compromise-seeking or counter-running trends also prevailed, paralysing and compromising the main directions.

Classical Greek antiquity

Let us first consider legal development in classical Greece. Thanks to archaeological legacy and written sources, we know almost everything about classical Greek culture, except for law,[1] poorly represented in these traditions. One of the reasons for this may be that although ways and laws [*nomos*] were developed to a considerable extent, there was no law proper with the Greeks

1 On Greek law in general, see JONES, J. W.: *The Law and Legal Theory of the Greeks: An Introduction* (Oxford 1956), especially 1–36, as well as GARNER, R.: *Law and Society in Classical Athens* (London and Sydney 1987), especially chs. I and IV.

in early classical times, at least in the conceptualised sense of modernity.[2] Instead, what we could find with them was some sort of a diffuse practice, a dissipated and fragmented everyday use, hardly measurable by the standards of discipline and definiteness, distinction and internal closedness of modern law. Greek antiquity might not have been able to develop the media refined enough to contribute to the survival of classical Greek culture and sensibility in law in European civilisation, the same way that the refinement of thoughts and material culture could survive, as revealed by *Homer*'s works.

In the following we wish to contemplate the pattern represented by early Greek legal thought. What and how *Aristotle* wrote about equity and the lead measuring rule of the master builders of Lesbos[3] might have been a drop in

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2 It is a later outcome—of *Drakon*'s and *Solon*'s era—that the rules of authority are named *thesmos*, with no regard of the fact as to whether public agreement backed them or not; and *nomos* [*nomoi*] stands for every rule accepted by the community independently of its origin. Change in the use of words comes forth in the 5th and 4th centuries B.C., as originating from the beginning of *Kleisthenes*' rule (507 B.C.)—see OSTWALD, M.: *Nomos and the Beginnings of the Athenian Democracy.* Oxford, 1969—when the *thesmos* implying a dictatorial rule of law becomes outworn, and the expression *nomos* spreads widely concomitant to the use of *psephisma* initially having meant 'voting'. The laws of *Drakon* and *Solon* continue to prevail, and they are called *nomos*, since there was actually no voting on them. Thus, *nomos* is gradually regarded as more general, more fundamental and more constant [*nomos* = law; *nomothe tai* = legislator, law-giver] as a normative pattern, as opposed to the rather individually shaped, concrete and temporary decree [*psephisma, psephismata*]. Cf. MACDOWELL, D. M.: *The Law in Classical Athens.* London, 1978, 44–45, as well as TODD, S. C.: *The Shape of Athenian Law.* Oxford, 1993, 18, which place this change of use in words to sometime after 403–402 B.C.

3 "The puzzle arises because what is decent is just, but is not what is legally just, but a rectification of it. The reason is that all law is universal, but in some areas no universal rule can be correct; and so where a universal rule has to be made, but cannot be correct, the law chooses the [universal rule] that is usually [correct], well aware of the error being made. And the law is no less correct on this account; for the source of the error is not the law or the legislator, but the nature of the object itself, since that is what the subject-matter of actions is bound to be like.

Hence whenever the law makes a universal rule, but in this particular case what happens violates the [intended scope of] the universal rule, here the legislator falls short, and has made an error by making an uncodificational rule. Then it is correct to rectify the deficiency; this is what the legislator would have said himself if he had been present there, and what he would have prescribed, had he known, in the legislation.

Hence what is decent is just, and better than a certain way of being just—not better than what is unconditionally just, but better than the error resulting from the omission of any condition [in the rule]. And this is the reason why not everything is guided by law. For on

the bucket, and despite the simplistic nature of this device, it signalled an available alternative, even if just symbolically, yet decisively for posteriority by the offered technique. In every known earlier civilisation (ancient Mesopotamia and the Jewish communities prior to their Diaspora), the measuring instrument was something solid—firmly built, with a fixed shape, not changing its size. It was something concrete that not only symbolised length, but incorporated it by its physically identifiable form. Such an instrument presupposed the measure to be capable of defining both the framework for and the parameters of measuring. In traditional understanding, length is a feature measured along a straight line. Accordingly, the measuring instrument was constructed along a straight line, capable of being directly used on a flat surface without further adaptation or mediation, and the length could be determined by simply reading off the result. Well, the characteristic of the lead measuring rule was that it could be bent, and thereby easily adapting to curved surfaces. It could take the shape of any spatial object when used for measuring whatever one pleased to measure.

We may claim that such a measuring instrument was rather a handy tool than any stiff stick. Considering the fact that it meant the only way to measure the length of curved, bent or angular surfaces, it certainly must not have been invented and used by chance. However, once the idea was applied to law it immediately became obvious that it also stood for something more or else. As *Aristotle* observed: by bending the straight, the underlying principle of the measuring measure was lost, for the measurement itself was adjusted to what it was meant to measure. What was to be applied as a measure was eventually broken into the casual and random characteristics of the object to be measured. Thereby, the *measure* itself became a function of the object to be *measured.* In other words, the straight line drawn on a flat surface, and thereby length as such, was relativised and the measure became a function of the measured object.

Reconstructions provided by the history of science suggest that most of our civilisational abstractions (differentiation, counting, measuring, figurative representation, and so on) are rooted in our ancestors' ritual approaches to their ancient gods, whom they also contracted with later on. In the centre stood the

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some matters legislation is impossible, and so a decree is needed. For the standard applied to what is indefinite is itself indefinite, as the lead standard is in Lesbian building, where it is not fixed, but adapts itself to the shape of the stone; likewise, a decree is adapted to fit its objects." ARISTOTLE: *Nicomachean Ethics*, trans. Terence Irwin (Indianapolis and Cambridge 199?), 1137b, 144–145.

humble being performing the rite, and our modern idea of regarding everything as absolute developed in its primitive forms through the subsequent generalisation of the most personal equivalents set once by these humans to pattern and represent themselves in human sacrifice, a cultural achievement ultimately transplanted into lay practice.[4] In sum, unmediated directness is the ancient condition, the protoform and once existing unity, from which various independent ideas, forms and applications have later branched off.

As soon as we presume the presence of such measuring instrument, we must also recognise that law as usually accepted within European culture is excluded. For thinking tradition has always presumed law (1) to precondition some sort of a measure, and (2) this measure to be available in human environment. For, apparently, presumptions of human thinking assume as a psychological condition the certainty of having the measure with us, of being able to take hold of it and to point at the particular material feature that incorporates it. As if it were a *sine qua non* to have it within the reach of our hands. Moreover, we request it to be capable of telling us at any time and under any conditions what law is. This is why the archetype of any idea of law is a table or a book of laws, as rooted in the fundamental psychological needs of mankind. This also explains why the human race was so stubborn in fighting for recording the law throughout past millennia. It also provides the explication to the culture of customary rites from which the very first legal profession originates, that is, the practice devoted to the *repetition of the law*, by which the accepted measurement was publicly announced every year.[5]

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4 Cf., e.g., from the works of SEIDENBERG, A.: "The Separation of Sky and Earth at Creation" *Folklore*, 70, 1959, 474–482, and 80, 1960, 188–196; "The Ritual Origin of Geometry" *Archive for History of Exact Sciences*, 1, 1960–61, 188–257; "The Ritual Origin of Counting" *Archive for History of Exact Sciences*, 2, 1962–66, 1–40; "On the Area of a Semi-Circle" *Archive for History of Exact Sciences*, 9, 1972, 171–211; and "The Ritual Origin of the Circle and Square" *Archive for History of Exact Sciences*, 25, 1981, 269–327. According to one of his recent works—SEIDENBERG, A. & CASEY, J.: "The Ritual Origin of the Balance" *Archive for History of Exact Sciences*, 23, 1980, 179–220—the origin of measurement is rooted in ancient sacrifice: whoever performs the sacrifice provides (by his weight or height) the measure itself, and the act of measuring is aimed at defining a *symbolic value* of equivalence, when substituting the personal sacrifice with the variables of whom performs the sacrifice. The relative measurement gains independence and claims absoluteness only during the slow process of secularisation of the rite (*ibid.*, 211).

5 Cf., VARGA, Cs.: *Codification as a Socio-historical Phenomenon*, Budapest, 1991, Part One.

The above holds for the higher and more abstract levels of generality too. English law presumes an underlying customary order, thought to have always existed. Even its naming reflects the prevailing ideology: this is the "immemorial custom of the Realm",[6] notwithstanding the fact that the whole construct is sheer historical fiction.[7] Of course, judicial experience may add that independently of what the juristic world-concept suggests, deciding what the customary order "says" will ultimately be declared by the judge in the given case.[8] That is to say, whatever the accepted ideology may be, we still presume the existence of some measure. Both the deontology inspired by the prevailing juristic world-concept and the theoretical reconstruction revealing what lies under the ideological veal assure us that *there is some measure in law* and it *does not depend on either of us*, and certainly not on either of the actual actors. It remains independent of us even if it can be actualised by the judge deciding in the case. What the judge rules in the given case is his responsibility. The role of the judge is to decide the dispute with an authority independent from either of the parties. The ideology of Common Law adds one more consideration: the judge makes the decision he makes because he has no other choice. If he can make this only one as conclusive from the prevailing law and order, then it must have been given and must have always existed independently of him.

Concerning the basis of this tradition of thought—presuming that law can only be what was already given and previously existed in some shape or form—the Civil Law conception is not much different from that of the Common Law.

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6 BLACKSTONE, W.: *Commentaries on the Laws of England* I, London, 1765, 73. Cf. SZLADITS, K., Jr.: *Az angol jog kútfôi* [The sources of English law], Budapest, 1937, paras. 3–4, 8–10.

7 "Blackstone's 'general customs' or 'customs of the realm' are those fundamental principles in legal relationships which for the most part are not to be found in any express formulation, but are assumed to be inherent in our social arrangements. They are, in short, the Common Law itself." ALLEN, C. K.: *Law in the Making*, Oxford, 1958, 70. Cf. also DAVID, R.: *Les grands systèmes de droit contemporains: Droit comparé*, Paris, 1964, para. 350.

8 The classic English power of text-interpretation is symbolised by the manner in which bishop *Benjamin Hoadly* expressed (*Sermon Preached before the King*, 1717) and *John Chipman Gray* commented (*The Nature and Sources of the Law*, New York, 1948, 102) on it: "Bishop Hoadly has said: 'Whoever hath an *absolute authority to interpret* any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them'; *a fortiori*, whoever hath an absolute authority not only to interpret the Law, but to say what the Law is, is truly the Law-giver." Cf. KELSEN, H.: *General Theory of Law and State*, Cambridge, Mass. 1946, 154.

According to the Civil Law ideology prevailing on the European continent, law at any given time is embodied in a set of statutes, that is, books of enacted laws, and these are always ready-to-take: *the law is given*. Therefore, the only thing a judge is expected to do is to apply the law to individual situations. It is exclusively the law that asserts itself through the judge making a decision. The human, who happens to be a judge and must apply the law, takes part in the process only by chance and without any personal contribution to the outcome. For judges are the mere artificial media and mundane symbols of a process that will take place "objectively" in any case, that is, independently of them.

To sum up, the legal world-view of the classical Greek antiquity bears the presence of the idea of an external measure quite loosely. There is no actual principle with the Greeks. What could serve for a principle is already broken into the casual, particular and arbitrary features of the event to be measured. Thus, the measurement itself becomes a function of the measured.

Roman legal development

1. The dikaion-period Research aimed at reconstructing the Roman concept of law reveals the already established use of strict conceptual distinctions. For, according to Roman mentality, we can only imagine and name things that are unambiguously clear and built upon notions with marked outlines.

The Roman jurisprudents were practical-minded professionals: it did not even occur to them to fall into sheer abstractions or raise theoretical questions about the definition of law. Their disciples, the Romanists, were mainly interested in unravelling—by systematising—the Roman heritage from a doctrinal point of view. Nowadays it might seem a commonplace, but from within a socialisation in a legal culture built upon abstract conceptualisations, I have been shaken by a realisation I had to face three decades ago. A legal scholar from Paris, *Michel Villey*, who was like a patron-father to me in my early scholarly years, presumed for himself rather eccentric views for the time. Being a legal philosopher well-learned in Greek, Roman, and mediaeval Latin sources, he might have felt an inner conviction to consider the ages after classical Roman antiquity the dead-end of errings within *voluntarism*.[9] Tireless in argumentation, he proved repeatedly and very consistently that the ideal of

9 VILLEY, M.: "Essor et décadence du volontarisme juridique" *Archives de Philosophie du Droit* III, Paris, 1958.

law prior to modern times had still been a medium for naturalistic discipline, supporting the moral world order in its self-assertion. It was not pure invention, or the toy for absolutisms, and was not used to enforce momentary ideas. His challenging arguments within the topic[10] have yet to be disprove by specialists of Roman law. (The want for rejection is, of course, far from being a positive proof, since it may also happen that students specialised in Roman law are not interested in features of the common heritage in the same way he was.)

According to *Villey*, Roman law followed the Greek pattern for a long period of time. It was the *dikaion* that served for law. As to its origins, *dikaion* means what is just; or, taking a step further back in origins, the *dikaion* is what is considered just, what is achieved, helping the ones whose task it is to achieve it.[11] More precisely, *dikaion* is the individual justness of the individual case, what the parties involved have to finally reach, provided they search for it relentlessly. Or, *dikaion* is not simply law, moreover, it expressly differs from the ideal of law of modern cultures.[12] The only conclusion that can be drawn from this realisation is that law as experienced today did not exist in early classical antiquity. No trace of it can be found either with the Greeks or the Romans prior to the republican era.

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10 Cf. VILLEY, M.: "Questions de logique dans l'histoire de la philosophie du droit" *Logique et Analyse*, 37, 1967, 3–22, reprinted in *Etudes de logique juridique* IV, Bruxelles, 1967, 3–22; as well as VILLEY, M.: *La formation de la pensée juridique moderne*, Paris n.y.

11 In its etymological contexture (e.g., based on HOMER: *Iliad* XVI, 541–542), the construction is confirmed by CRUZ, S.: *Ius Derectum (Directum): Dereito (Derecho, Diritto, Droit, Direito, Recht, Right, etc.)*, Coimbra 1986, 34–35. On the full complexity of its set of concepts, cf. LIDELL, H. G. & SCOTT, R.: *A Greek-English Lexicon*, Oxford, 1973, 429. GARNER (*passim*, especially ch. I, para. 2) is extremely critical of such an interpretation; his reconstruction of the concept (p. 4, and OSTWALD, M.: "Ancient Greek Ideas of Law" in *Dictionary of the History of Ideas: Studies in Selected Pivotal Ideas*, New York, 1973, 678) is, at the same time, mostly reminding of the world-view of the Chinese *Tao*. For the background also see WESTRUP, C. W.: "Sur la notion du droit et sur le mode primitif de formation du droit positif, c'est-à-dire du droit coutumier" *Tijdschrift voor Rechtsgeschiedenis* XI, 1932, 1–18.

12 CORNFORD, F. M.—in *From Religion to Philosophy: A Study in the Origins of Western Speculation*, New York and Evanston, 1957, para. 97, pp. 172–177—deduces the word *dika* from the concept of the usual order of nature (cf. HOMER: *Odyssey* XI, 218 and PLATO: *Laws* 904E), immediately relating it to the Buddhist *dharma*, the Vedic *Rta* (cf. OLDENBERG: *Die Relig. des Veda*, p. 196), and to the concept of the Persian *asha* (cf. CHANTEPIE DE LA PAUSSAYE: *Manuel d'histoire des réligions*, Paris, 1904, 467).

All through its evolution, law has been a casual and incidental product, emerging from within a more or less spontaneous social process. It did by no means represent anything given, present or disposable. It was not something freely avoidable, or—this being the advantage of constituted things—it could be rejected only with a reason, by repelling an otherwise natural continuation. Law, in its evolution, is not something exposable as a real object, like a *Mosaic* stone. Neither it is an end-product, like a book of laws. For law is the outcome of *processes* everywhere and at any time, but especially during this period. In its classical Greek understanding, law is a result anyone can/could arrive at. Only provided, of course, that one is prepared to take part in the common shaping of the law as a good judge, sensitive to communitarian values, and experienced in finding paths to them. Naturally, finding the path presumes a journey, yet journeys done with a given purpose may have several ways around. It may happen that we arrive somewhere else than we initially meant to. Well, with the *dikaion* there is no assurance that we will find the path or reach the desired result. The only thing we can be sure of is that the path *can be* found; yet there are no guarantees that it will finally be reached. Proper media and proper personalities are required: a judge who is able to find the path within the given medium.

As *Villey* put it: law in the pre-classical ages only served for a *spring-board* to arriving at law proper, that is, *dikaion*. Any legal proposition the judge could make reference to could serve as a starting point at the most in finding the concrete justness of the concrete case. For justness was thought to be individual, which the parties in the trial had to achieve. To put it another way, law was not yet conceptualised. It made its appearance in speech, in the sequence of words, but it was not yet forced into clear-cut conceptual schemes as elements of a logified system. What was actually regarded as law was used to launch the debate, and provide its framework. Still, it was not meant to predetermine the outcome thereof. Individual solutions or recipes ready-to-take acceptable as law were only available through the judge acting on behalf of the community. Thus, it did not serve as a recipe to be applied under any conditions. On the other hand, anything that could be regarded as substantially contributing to finding this very solution could become its component.

According to the underlying thought pattern, law built upon the ideal of *dikaion* can be considered *open* argumentation. A reasoning is open if it allows any set of solutions without previous determination. It is open if it may refer to or rely on anything the parties recognise as helpful in finding the individually just solution. A reasoning is open when it sets the only goal to arrive at a decision acceptable for the community. Well, to better understand

the issue let us contrast open argumentation to what it negates, *closed* reasoning. Let us imagine a hierarchical relationship with rigid subordination schemes, for example, the one established in the army. The service regulation in the army provides a one-way commanding chain including the exclusivity of closed argumentation. That is to say, whatever event is to be faced, the subordinate can communicate only by choosing and applying one from among the previously codified set of patterns, and the other way around, the superior may respond by choosing from the patterns applicable in the responding channel. Be it the case that an enemy broke the lines and is shooting the target, or that the subordinate wishes to use the restroom, the communication will follow a homogenised pattern. This is perfect closedness itself. In any possible situation that may occur, the party entitled to determine the path of communication will choose one of the previously established patterns and by applying it will decide the issue for good. This response will be definitive and of merit. The subordinate cannot contest this response. At the most the superior of his superior can do it in a subsequent procedure (e.g., for assessing personal achievement), qualifying the case, may be, as missing the point, but only posteriorly. In sum, nobody can influence the direct operative force of the answer (as the case might be: the inadequacy of the procedure chosen by the superior) by any means. On the other hand, in case of open reasoning one can take any direction and make reference to anything, since the only goal of the procedure is that the discussion (not limited in its sources of inspiration, means, or references) should lead to a result accepted by the community, through which the chosen procedure will ultimately get justification as well.

2. *Praetorian law* After a certain period of time the law as described above also had to be restricted and limited. While according to the idea of *dikaion* any reference could be included in the reasoning—with the only restriction that the arguments originate from law, or at least be retraceable to legal tradition—because the exclusive target was the individual justness of the individual case, in the republican era a search started for closing the argumentation.

As is well known, there are two ways of setting limits to reasoning. On the one hand, we can determine *procedurally* who can participate in the given reasoning, in what way and sequence, and within what time frames. We can also define the form of procedure, for instance, the way an argument one of the parties intends to introduce to the process ought to be presented. (Let us recall that a similar procedural formalisation eventually became the fundamental

organising means of English law.[13] For about a thousand years, the question of whether law exists and what it may be for a given subject was determined by the availability of a specific judicial procedure, namely a formula instituting an action which could ensure the judicial enforcement. For this reason the adage "no writ, no right" could become the foundational principle of Common Law thinking. For generations of jurists this adage provided the basis for the particular understanding that it is not necessary for the law to be recorded in books as letter-formulas, neither to assign primary importance to abstractly defining what a person's rights are in an imaginary situation, since if proper judicial procedure is institutionalised and made available, and, as the case may be, the parties recourse to it, the process must ultimately lead to the proper declaration of what the law is. That is to say, law is built upon trust, upon the continuity of tradition arching over generations: in as much as the due process of law is ensured, the proper solution will follow in and of itself.) On the other hand, one can select and delimit the sources from which arguments can be taken. In such case, independent of the intention (be it that the actor in our previous example asks for permission to open fire or to go to the restroom), the arguments will be strictly codified both in their merits and in the way they can be presented: they can only be from the set of previously established patterns. This is comparable to making pigeon-holes for notions, defining the number, sequence and order of the holes. Whatever consideration we may hold, one can only choose from the given arguments. One can choose either of them almost at full discretion, feeling perhaps somewhat restricted in choice by the rules of use attached to the set of arguments. Either in the case that the answer is delivered under the enormous burden of personal responsibility or with a sheer routine concealing the lack of genuine interest, from this point on one can proceed only by fitting the opinion into the clothes of previously established *patterns*, the entire argumentation taking the shape of some sort of repetition.

In praetorian jurisdiction the unbound freedom of reasoning was surpassed by delimiting the procedures that could be followed and then attaching the referable sources of arguments to well-defined authorities.

One of the key instruments to implementing the above changes was the institutionalisation of *relevance*. Relevancy introduced a new principle of selection, as, in opposition to open reasoning, it was built on formal criteria.

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13 On the history, practice and theory of writs, i.e., the Anglo-Saxon formulas in comparison with the Roman *actio*, see, e.g., PETER, H.: *Actio und Writ: Eine vergleichende Darstellung römischer und englischer Rechtsbehelfe*, Tübingen, 1957.

For the sake of conceptual clarification, we must make it clear that no relevancy with substantive claims would be relevancy any longer. With substantive arguments, we may also reason by referring to something that can forward the judgement. Once restrictions are made—be they of procedural nature or delimiting the sources or the character of the arguments—we unavoidably advance and thereby pre-select certain procedural channels or paths. By the force of qualifying them as relevant we make them exclusively available, and by introducing these arguments to the procedure we allow the case to be brought up, or allow us to join it. All in all, the procedure has been transformed into pattern-followance: by having attached any step in procedure to a criterion, we have reduced judicial invention to a function of previously established patterns.

Once relevancy is institutionalised it will exclusively depend on the applied criteria that when interpretation is required—e.g., in case of a rule saying "Dogs are not allowed into the park!"—using the word 'dog' will depend on the selected terms whether we mean an animal with brown colour and weighing a few pounds, or rather one which usually has an unpleasant odour, dirties the place very quickly, suddenly starts biting, barking or running in all directions, and whose rushing into the park may disturb those who wish to have a rest, and so on.

No matter what is to be defined (dog, house, fence, car or human being), each definition will necessarily display an inexhaustibly rich mine of possible traits and aspects from among the ones we can count with. Each of them can turn out to be (possibly or exclusively) relevant. All the above depends on what criteria we set. Thus, we place relevancy into a position to individually pre-select the values to be protected and, in addition, define them as well.

We will see in another context that relevancy's role is not restricted to closed reasoning. Everyday thinking and common language use are both built upon relevancies.[14] We rely on relevance whenever we approach facts in either everyday life or scientific reconstruction. To put this in a life-like form of expression: we can perceive something only if it is "reminding" of something previously perceived. Moreover, in the basic act of perception (that is, when using organs of sense or engaging into some sort of perception) the stimulus will be interpreted in the neural processes of the

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14 Cf. KENDAL, G. H.: *Facts,* Toronto, 1980, and, in a wider context, see VARGA, Cs.: *Theory of the Judicial Process: The Establishment of Facts,* Budapest, 1995, ch. 3.

organism only in relations to and through some expressly or tacitly acknowledged relevances.[15]

As far as law is concerned, as legal development advanced human situations became more and more complex, so their immense variety could only be expressed if reduced to so-called *typical* situations. Therefore, since various situations may occur, these have to be projected on some previously established (codified) typical situations so that they can be processed through law and be transformed into a case within the law, making them available to regulation or normative patterning. The human process of normative standardisation and adjudication is limited due to its very nature, therefore an artificial filter must be applied. As a comparison, let us consider a situation in which we face an immense body of water, and our only disposable means to drain it is a set of pipes of given shape and permeability. Yet, we also need to realise that as soon as we start thinking in terms of pipes and procedures, we cannot (and actually do not) consider water "in general" any more.

Once some relevancy surfaces it is no longer the water "in general" that will interest us, but exclusively its rather practical procedural aspects, namely, the intriguing question of how we can start and efficiently end the work with our pipes and procedures. So to speak, from now on the relevance as such and relevance only will be directly relevant.[16, 17]

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15 The so-called *Gestalt* psychology had a revolutionary realisation, namely that in the process of perception the conscious does not build the whole from the parts, on the contrary, following the recognition of the interpretable whole as reminiscent of some previously interpreted, the individual components and their variations are identified afterwards. On the classics, see KOFFKA, K.: *Principles of Gestalt Psychology,* London and New York, 1935, and WERTHEIMER, M.: *Productive Thinking,* London, 1966; in a current elaboration, HAMLYN, D. W.: *The Psychology of Perception: A Philosophical Examination of Gestalt Theory and Derivative Theories of Perception,* London, 1957, and KATZ, D.: *Gestalt Psychology: Its Nature and Significance,* London, 1951; for further analysis, see GRICE, H. P.: *Studies in the Way of Words,* Cambridge, Mass. and London 1989, and JACKSON, F.: *Perception: A Representative Theory,* Aldershot, 1993; for a philosophical summary, LANDESMAN, C.: *The Eye and the Mind: Reflections on Perception and the Problem of Knowledge,* Dordrecht and London, 1993.

16 The role of legal advisor lies in revealing the relevant factual circumstances. Legislation differs from other curing mechanisms in that its virtue and possibility to fail is primarily not in the merit of its answers but in finding adequate relevancies. We may have some good advice for how to ease tensions, but purposeful within law can only be the institutionalisation of a procedure that successfully combines the selection of relavancies suitable for launching a procedure (that is, factual circumstances provable within a trial procedure) with a legally operable sanctioning mechanism. On basis of the successive series of English statutes on race

3. Justinian's codification In the mature Roman imperial era—culminating in *Justinian*'s time—the formal features of law became systematic and exclusive, permeating law as a whole. Our historical knowledge ascribes the change and the formation of numerous instruments of modern legal arrangements (conceptual system and regulatory tools) to *Justinian*. Yet, closer analysis revealed that nothing really new emerged under his reign. Actually, it is the conclusion of legal development that was done in his time. May we ask: what and how was concluded? The usual answer holds: through *codification*. Albeit in reality the jurisprudents assigned by *Justinian*—about whom we may find classical reference in *Titus Livius*[18] and others—did not do anything but search for and choose from various sources of law and, finally select the ones they considered suitable. That is to say: they incorporated the selected sources into a compilation which the Emperor declared as the only one referable at court. The outcome was one single body of laws and it was made exclusively referable. So *Justinian* was the first to combine legal codification with the prohibition of interpretation.

After the sources of law had been consolidated, anyone could tell what the law of the empire at any given time was. The only requirement was to verify what was *formalised* as law as having formally been incorporated in the compilation. For a contrast, let us recall that not long ago the law was the *dikaion*: some sort of a formless medium, which hardly qualified as worthy of being called *ius*. Well, the mass of such *ius* constituted the material from which the Emperor had to choose. What the jurisprudents compiled into the *Digesta* and *Justinian*'s *Codex* became the prevailing body of the law to be enforced by the imperial power, by promulgating it as parts of imperial edicts, that is, by the act of their enactment as law. The imperial *lex* thereby reduced

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relations promulgated due to various good intentions and idealistic pressures, see VARGA, Cs.: "The Law and Its Limits" in his *Law and Philosophy: Selected Papers in Legal Theory*, Budapest, 1994, 91–96.

17 Type-constraint ascribed to a codified set is characteristic of formalised conceptual systems and procedural orders, which may have alienating effects when transferred to fields alien to own merits and inherent nature. STEINER, G.—in his *Language and Silence*, Harmondsworth, 1967, especially at 136–137—called the attention upon the merciless destructive effects that are to realise when private intimacies (especially sexual habits and intimate communication) are publicised by the media: it is not liberating but emptying for future generations, since breaking privacies into types degrades the audience into external pattern-followers, depriving living individualities of the magic of incomparable uniqueness.

18 LIVY [Titus Livius *Rerum Romanorum ab urbe condita*] English translation II, trans. B. O. Foster, Cambridge and London, 1967, III, 9–57, especially at 113–195.

the idea of *ius* proper to what was legally *posited. Statute* became the exclusive carrier of the law, making it irrelevant (and even forbidden) to refer to anything else as law. (As nowadays, the law can be criticised from an external point of view at the most, projecting a value judgement from outside onto the values formulated within the law.)

As seen above, *Justinian* invented the instrumentality for ensuring the enforcement of his code, which later became a well-known tool at *Frederick the Great.* For he created an imperial committee next to him to clarify interpretational problems that could occur in the process of application.[19] We ought to realise that the notion itself thereby became suspicious because a negative value judgement stained the original meaning of *'interpretation'*. Perhaps this is the first instance where the word 'interpretation' disguised 'lawyering' as 'pettifogging' or 'nit-picking'. It is the first time that a false contradiction appears between the allegedly clear meaning of legal provisions and the unambiguity of their followance, on the one hand, and the intentional ambiguity of the procedural definition of meanings and their burdening with possibilities of evasion, on the other.[20] For the act of demanding and performing 'interpretation' has been made suspicious in and of itself from the very beginning. The entire late-Roman thinking in terms of codification is built upon the assumption according to which if the emperor wishes to say what the law is, he will do so and, by doing so, the issue itself is solved: all subjects of the empire will promptly know what the law is, so that they can conform themselves to it and avoid sanction.

Or, one could say that the law has been *objectified* through its conceptualisation. From now on the law is embodied by conceptually generalised norms which can be safely applied to any concrete individual situation in a way that the relevant norms offer a decision for the cases in question.

Indeed, the idea of a code was thereby born. In other words, this is the projection of the prevailing pattern onto law, represented in European history in its most pure form by *Frederick the Great.* As is known, he dreamt about becoming the progenitor of his empiredom, the exclusive centre of creation radiating to and demanding prevalence everywhere.[21] This assumes the idea

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19 Cf., VARGA: *Codification...*, in particular at 37, and notes 31 and 34 at 44–45.

20 As a modern presentation, we may find the most classic expression with *Luther*, cf. LUTHER, M.: *Tischreden* (Weimar edition or by Förstemann & Bindseit).

21 In the most telling form of expression, see MACAULAY, T. B.: "Frederick the Great" in (Lord Macaulay's) *Essays*, London, 1895, 808 and 815, as well as MANN, T.: "Frederick the Great and the Grand Coalition: An Abstract for the Day and the Hour" in his *Three Essays*,

that whoever posits the imperial will, will posit society by his act as well.[22]

Once law is created on the basis of such understanding, it also becomes clear that the normative production will necessarily result in positivation, in the marshalling sense that further positivations will only be derived from it. It is essential to comprehend that within a culture of regulation like this, what derives from the leading positivation (or its derivatives) will derive *logically* and *linguistically*—that is, unambiguously, out of necessity, allowing no varieties and exceptions, by the force of logic.

Enlightened European absolutisms were laid on this fundamental idea. The monarchs assumed that in the political hierarchy of a well-arranged empire it is the creator, the sole Ego that truly counts. Therefore, every office and office-holding beyond this will be sheer application, that is, *implementation*. This means the execution of something that has already been decided in all its details. The prevailing opinion of the time expressed a mechanical world-view, as opposed to the discretional arbitrariness of feudal absolutisms, according to which the judge deciding and resolving social conflicts—reminiscent of *Charles de Montesquieu*'s expression—is hardly more than a living mouth that can only pronounce the provisions of the law and nothing but the law.[23]

Yet, the conviction reducing the judge's role to the living mouth in service of the law will necessarily assume the humble realisation that the weight of the personal contribution to, and the responsibility to be born for the decisions is next to nothing. Obviously, this is not because someone has broken the order of society and anarchy is ruling, but because this is what derives from the very idea of order. Precisely because there is an *overall* order, the order is an overall one—implying that no one has (or can have) any further role in addition to the one of the law. If the magisterial decision can only be done within the limits of statutory definitions, the responsibility for it will also have to be born by the legislator, the sole master of statutory definitions. There is no other player on the stage and no further role missing either.

London, 1932, 156–157.

22 LUKÁCS, G.—"Solzhenitsyn's Novels" in his *Solzhenitsyn*, London, 1969, 52–55—criticises *Stalin* for the same reason, namely that by this he deprives society of its driving forces and subjects it to degeneration into a sheer tool of an external will.

23 "Mais les juges de la nation ne sont [...] que la bouche qui prononce les paroles de la loi, des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur." MONTESQUIEU: *De l'esprit des lois* book XI, ch. VI in his *Oeuvres complètes* I, Paris, 1839, 196.

Finally, we should recall the structure of the *Digesta* and the lasting effect of the solution it offered. The *Digesta*—just as all subsequent codes undertaking the embodiment of laws in one single *corpus* (instead of re-enacting them as logically inter-related parts constituting a system)[24]—compiled the chaotic series of provisions into one given body, and nothing more. A historical collection was thereby accomplished, accumulating (without any arrangement, correction, adaptation, hierarchisation, systematisation or reformulation) largely divergent legal opinions and considerations. Still, it marked a crucial milestone in legal development, considerably simplifying the chaotic mass of situations as subjects to decision. From then on the logic for procedure became feasible as follows: the law embodied in a text either includes a passage for the case or not. If it does, then the debate—in accordance with the ancient principle of *quod dixit dixit*: by the bare existence of the *locutio*—is resolved and the decision made, since the only job is to apply the provision for the situation, and this will already lead to the decision. In the reverse case, when there is no relevant passage, the only conclusion that can be drawn is that the case does not have a legal solution, since there are no provisions for its solution.

Enlightened absolutism

Enlightened absolutism usually means the era prior to the bourgeois transformation mainly in Western Europe, and especially in France, Germany and other countries of similar historical evolution. Enlightened absolutism also means the particular era of legal development when the monarch, by the force of his centralised power, becomes capable of asserting his own interests as state interests, and initiates a *systematic* and *comprehensive legislation* to set an organisational framework for their practical implementation.

The monarch's goal is irrelevant in the above perspective. It is enough to learn that there are not just ideas, games and bettering intentions that may lead him, but also the constraint of choosing between the prospects of survival and destruction. The country and the sovereign's cause cannot survive unless feudal division is overcome. To gain predominance, the monarch must establish state finances as separate from his own. An impersonal, rational and comprehensible order in financing imperial unity has to be established so that—as the second precondition—the state army can be set up by replacing the

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24 On the separation of the types of codification as *quantitative* accumulation and as *qualitative* reformulation of the law, see VARGA: *Codification...*, ch. XI, para. 2.

rivalry between various feudal lords' private armies with a centralised army under royal command. In order to be able to dispose of state finances needed to equip and maintain the state army the sovereign must interfere—as the third precondition—in the economy, thereby making separate sources of income available for state purposes.

This is the point where modern development in Europe starts, when the monarch dares to intervene with trade, agricultural and industrial affairs, and when—only thinking of *François Marie Arouet de Voltaire*'s black journalism[25]—even the question of uniform measures arises as an issue of state unity. It also implies the realisation—and this is the moment for us to see law and legal organisation as a *sine qua non*—that a complex and *bureaucratically routinised administration* is needed to handle the financial and military affairs. For the monarch who excels only in superimposing his own will (by force, strategy or art) can no longer set the course for the future. Exclusively a monarch who creates and organises the financial support of war and peace—by founding and bureaucratically operating an institutionalised state machinery—can have hope of success in prevailing over the new hegemonies.

In order to implement these, the ruler must provide for complex and comprehensive legislation. An enormous mass of provisions is needed for accomplishing a suitable regulation in a way to unify the existing sources of law and make them free of contradictions. State offices have to be set up and an army of state officials appointed for that an impersonal application of the aggregate of new regulations at a mass size to be possible as well as to guarantee the proper operation and practical implementation of the law. Codification performing the sheer quantitative summation of the law into one body of laws (practically exhausted in recording and, occasionally, reforming the customary law) did not prove enough for the new job of processing, systematising, and also compiling such an enormous quantity of norms.

Monarchs and jurisprudents went back to an instance as old as the one of classical Roman empire, almost forgotten in Europe: *Justinian*'s legislation. (We may realise later on how different a perception they had of the Roman-Byzantine archetype, depending on what formed the basis of their experience: the dismembered variety of customary laws on the European Continent, or the uniform royal administration of justice on the British Isles. For divergent

25 VOLTAIRE: *Dictionnaire philosophique* in his *Oeuvres complètes* VII (Paris 1876); cf., VARGA: *Codification...*, especially at 95–97 and notes 16–18 at 127–128.

experience could see different traditions in the same historical roots, thus giving birth to different traditions.[26])

The solution was to design legiferation within the framework of the *axiomatic* ideal of *system* so that the aggregate of all individual norm-enactments could be organised into, and applied as relevant parts of, a system. The idea of such a system proved to be rather specific from a systemic point of view as well, since it could qualify as a system only for the reason that its individual provisions were promulgated together as parts of one consolidated act. The underlying idea suggests that what in legislation is enacted as a total sum of rules is considered a system. Or, both the process and its outcome bear an ideological character, independent of actual contents. In the ultimate analysis, it is a system because it claims to be, and it operates as a system because the legal profession recognises it by operating it as a system. All in all, it qualifies as a system since the legal profession actually enforces it through living practice. That is to say, the contingency built into the construction and structure of such a system is counter-balanced by judicial practice, which, secondarily positing—while applying—the law, actually forms a real system from it. Paradoxically enough, any aggregate will transform into a real system if it is *applied as a system* consistently and recurrently.

What does the idea of system consist of here? Systemic character is embodied, first of all, in that it is applied as if it expressed an internal *logical* consistency and necessity. So, it is applied in a way that it can result in nothing but one single decision, exclusively conclusive and fulfilling all requirements for justification. And also the operations within the system suggest a formalised and logified medium, as if the given result derived therefrom by the force of formal logical necessity, that is, in an *exclusively justifiable* way.

What is added to the notion of codification by enlightened absolutism is the idea of system as such. The pattern offered by *Justinian* in his *Codex Justinianus* was, however, contingent. For if there is a set within logic which is known to be contingent, the elements thereof will also be fully contingent. Consequently, the sub-set of elements missing from the set will also be contingent. That is to say, in an arbitrary aggregate in which the occurrence of the actual components is entirely *arbitrary*, even the set of missing components will be arbitrary. In other words, if the components in the set are called "law",

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26 Referring to the compilation undertaken by *Justinian* as the synonym for objectifying the law by committing it into writing, see, e.g., BEDE: *Hist. Eccl.* II, 5 (BEDE: *A History of the English Church and People*, Harmondsworth, 1968, 108) who mentions *exempla Romanorum* when speaking of the barbarian *Laws of Aethelberht* (around 731).

and the missing ones "gaps in law", both the gaps and their fillings whatever way they were born must be arbitrary as well.

In enlightened absolutism the idea of system transcended the pattern set by *Justinian* only in that it replaced the mere collection of norms into an incidental chaos by conscious and foreplanned norm-positing. No doubt that a system was thereby created in the sense of provident, thorough planning and coherent building, yet the implementation of its axiomatic ideal was only crowned by partial success. The doctrinal rigidity of the Prussian *Landrecht* gave birth to a non-viable gnome, and *Frederick the Great*'s attempts at a minutely accurate regulation degenerated into genuine casuism.[27] It actually fulfilled the requirements of an axiomatically built system through elevating each individual norm-proposition to the rank of axiom, instead of deducing the system from axiomatic premises, breaking it down gradually and consistently.

In consequence, independently of how much we strive after filling the casual *gaps*, we cannot alter the contingency of the system itself. As soon as one gap is filled other gaps may emerge, because no comprehensive principle and in-built ground for further arrangement will be provided through filling any series of individual gaps. To better understand this issue we will use an expressive comparison. Let us suppose that we would like to hit certain circles on a target. We may agree to each shoot three times a round and afterwards see how many hits each of us had. Yet, in a less fair manner, we may also agree to use machine guns, leading even to the possible physical destruction of the

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27 From the tremendous mass of some twenty-two-thousand sections of regulation, quite a number apply only for picket- and board-fences respectively, and the instructions for cases of child-murder require more than a hundred paragraphs.

"The editors of the *Landrecht*, not taking into consideration the fact that the demands of life cannot be forced into a predefined framework but must draw their nourishment from the enlivening principle of freedom, strove for pushing life conditions intó thousands and thousands of minute paragraphs, so if one is eventually bound to look into the Prussian *Landrecht* will in any case »miss the wood for the tree«, as *Bluntschli* makes the appropriate remark. And as these thousands and thousands of minute rules compromised the demands of life rather than sanctioned them, [...] we may easily see the reason [...] why this Code became outdated within barely 20 years." "The ones who prepared the Code had to therefore attempt to create rules for every possible case; because it is most impossible to force those judges to be exhausted in mechanical activity who while being faced with the thousands and thousands of manifestations of life, are destined to untie the most variably complicated knots: the untenability of this major principle in the Code is obvious to an extent not to require any further proof." DAEMPF, S.: *A magánjog és tárgya: különös tekintettel a magyar általános magánjog codificatiojára* (Private law and its subject: with special emphasis on the codification of Hungarian general private law, Pécs, 1877, 175–176 and 177–178.

entire target (just like late communist top nomenklatura rank and files in Hungary considered it hunting to chase the game in jeeps and shoot at it with machine guns). It might be a justified hope that shooting vehemently enough will increase the chance of hitting the target despite major dispersion. Returning to the pattern by *Justinian*: no system can actually be revealed from his Code. Nevertheless, what it displays is merely a total set of incidentalities. In such case we may attempt to completely fill the gaps by destroying the target. There are no other alternatives. There is no genuine solution in law in particular for law does not even have the clear physical outlines of a target. In conclusion, there are no available means of achieving a complete and gapless regulation in law.

In sum, the idea of system of enlightened absolutisms makes an advance similar to blowing up the target, instead of shooting at it with individual bullets and counting the individual hits. Also the feasibility of gaps in law is thereby excluded, for the emergence of the question itself is excluded: did we have a hit at all? Obviously, this is a radical solution, requiring radical intervention. Instead of a fairly easy (yet unknown for the time) search for a solution in principle, the chance of any response is rather excluded by over-securing what is attempted as over-execution.

The codificational ideal of the *Code civil*

After exuberant attempts (concluded by *Frederick the Great*'s *Preussisches Landrecht*), for the first time in legal development a systematic completeness was achieved by reconstructing the law in a logically coherent structure, gradually building up the law's system in a consistent way, starting from the general and breaking it down to a series of particulars—that is, as the hierarchical summation of fundamental principles, rules, exceptions to the rules and, finally, exceptions to the exceptions.

The axiomatic construction could only result in regulatory completeness, as the ideal of regulation proper strove for completeness.

No wonder that in practice the enacted rules are not complete in and of themselves. It often happens. The decisive change is that there is a solution in principle and actual gaps are no longer in a position to refute the claim for completeness as a reasonable objection. From then on, no matter how true, it is useless to mention that, for instance, mining law, labour law, social law and other modern fields are missing from the system of the *Code civil*. Notwithstanding that entire fields of regulation are missing from its regulatory

system, it still includes tacitly accepted or expressly recorded *principles* which define, through either setting the framework or direct wording, what the legislator actually intended to regulate. At the same time the same principles guarantee in practice that everything the legislator meant to regulate (that is, what is included "in principle" in the regulation) will be enforced through the judicial process.

According to its official understanding, in this new culture of thought the legislator did everything he meant to do. The work is perfectly done on his part. Therefore, from this point on, it is exclusively the judge's job to draw all the conclusions that can be drawn at all from the legislatory enactment and to apply them to the case to be decided. (In the reverse sense, the judge may also reconstruct the situation as follows: although the legislator did whatever he wished to do, the work is still deficient, full of gaps. It is the judge's job to complete it by continuing the legislator's work. The question of deciding what path to choose for ideological reconstruction concerns the judge alone. Thus, he may ideologically substantiate added claims at please alongside the above path of reconstruction, yet this will not affect the completeness in principle accomplished by legislation.)

Historically, it is a striking observation that in every legal culture, where the demand for and the ideology of a complete regulation was formulated, a second consideration was also asserted, namely that the law—not against its generality but as a consequence of it—not only "*can* be applied", but "*must* be applied" to individual situations. So, the initial presumption characteristic of the underlying legal culture manifests itself again: on the level of the law and order, the completeness in principle of the positive regulation is ideologically presumed, accompanied by the further assumption that new laws (entering and also shaping the regulation) are issued as additional components to the aggregate of norms organised into a system.

From this concept of system an entirely new choice is derived as well, creating some sort of basis for further ideological options in application. It concerns the practical consequences of the declaration that there are no gaps in law. For the law in its given wording has already provided a *full* response and this is what to rely on when making a decision, perhaps building on the exception to the rule, or, as the case may be, on the rule itself. Whenever there is no rule directly applicable, one may argue starting from assessing previously established general principles. Based on that assumption, we shall also accept it as a response of the system that the system does not provide any answer to the issue to be decided in law. It complements the formal prohibition of "refuting the administration of justice" as sanctioned by the French *Code civil.*

As known, the Code did not prescribe at all that decisions of merit shall be made and legal actions admitted in every case, but it provided that the judge who rejects to administer justice by the allegation of the law's silence, obscurity or insufficiency to be found guilty in the offence of "refuting the administration of justice".[28]

Parallel to the promulgation of great modern codes, at the end of last century, debates revolving around the completeness of regulation and the feasibility of filling its gaps arose also in Hungary. As opposed to the mainstream view excluding gaps from law, the reverse statement was also formulated, saying that the system itself is nothing but an infinite sequence of gaps. (This latter realisation formed the ideological basis for the so-called "free law" movement, fashionable in Europe around the turn of the century.) At the end of his life, *George Lukács* argued in his *Ontology of the Social Being* that as soon as societal development reaches a given level, denying it and returning to any previous stage is possible only on ground of this particular level. That is, for example, we cannot return to a Robinsonian way of life without assumed cognisance and actual negation of the societal development level we have reached up to that point. We simply cannot step backwards in a way as if the memories of our past existence were erased. Well, the ideology lies in the achievement of modern codes providing regulation which build upon principles. Therefore, stating that law is nothing but an aggregate of gaps is far from being a denial of systemic completeness, but is an alternative answer derived from the same idea of system. One can state that gaps may eventually emerge. On the other hand, one can also state that the total system of regulation is basically a sequence of gaps comprised by the system only in principle to qualify them as its parts. Although, at the moment we admit that the given system of law comprises in principle what the law intends to regulate, the recognition of the underlying thesis is already accomplished.

Hans Kelsen's *Stufenbautheorie* is built on this particular realisation. According to him, law-making and law-application cannot be separated from one another into two independent entities, notwithstanding that the old paradigm built upon the duality and sequence of "construction" and "operation" suggested so. Within the system of law—from the fundamental constitutional norm [*Grundnorm*] conferring validity on the entire legal arrangement, through laws, decrees, judicial decisions, to the enforcement act of individual decisions by the

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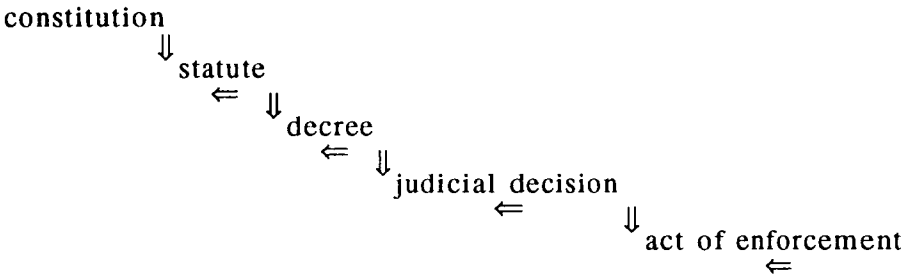
28 "Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité et de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice." *Code civil* para. 4.

ultimate authority—every intermediate step is double-faceted, qualifying as law-making (to fill the vacuum in full discretion of particular regulation consecutive to the basic settlement through superior principles and norms), on the one hand, and law-application (to implement the limitations prescribed by superior norms in the reverse direction), on the other. Thus, with the exception of the two extreme poles, every intermediate step qualifies *firstly* as law-application and *secondly* as law-making.



⇓ = law-application
⇐ = law-making

We were not mistaken much in microphysics when we stated that the air is essentially a vacuum somewhat disturbed by material pollution. As a vacuum it is void of material substances, although nitrogen and oxygen, as well as the various granules of genuine polluting substances constantly mix with it. In the same way we might state that the area covered by codificational regulation (e.g., the hundreds of rules in the *Code civil*) is a sort of pollution successfully challenging the vacuum, the area free of regulations.

The new achievement of development is the idea of *system* itself. Hence the law offers a response to relevant questions not only through its individual rules (or, in case of gaps, remains silent not only through the lack of an individual rule) but also through its system proper. In law conceived as a system there can be no gaps whatsoever, at least in principle. What may happen is that the parties addressed a question to the law which is not its case.

Turning point in the way of thinking

Analysing thought patterns we have arrived at a definite turning point. As we could see, there was no actual independent measure in case of the lead

measuring rule of Lesbos.[29] We could realise that, to some extent, the measure was created as a result of the act of measuring. Gradual development in the West has arrived to ideologically claim the *exclusivity for measures*. Everything initially created for man's service was thereby successfully liberated from him even to his detriment. The excessive objectification can turn the measure into an independent factor so much that even the person performing the act of measuring can become entirely irrelevant. By routinishly using ready-to-take measures, the act of their application can lose any creative contribution whatsoever. The measure of measuring has become externalised and externally identifiable, moreover, tangible in the strict sense of the word. Hence it is freely available to anyone, but can easily degenerate into one dominating everyone. At any rate, thrusted to the other extreme, the measuring has become a sheer function of the measure.[30]

29 Cf. VARGA, Cs.: "Patterns of Thought, Patterns of Law" 38. *Acta Juridica Hungarica*, 3–4, 1997, forthcoming.

30 For a wider context of the issues treated in the paper, see VARGA, Cs.: *Előadások a jogi gondolkodás paradigmáiról* (Lectures on the paradigms of legal thinking), Budapest, 1998, in particular ch. 2, 50.

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KALEIDOSCOPE

New Legislation on Health Care in Hungary

Introduction—health law in Hungary

Health law has been put under profound revision recently in Hungary. Since the end of the 80's, intensive debates emerged concerning basic bioethics and health law issues.[1] During these debates it became apparent that the old legislation on health care[2]—dating back to the beginning of the 70's—despite providing comprehensive coverage of several basic health law issues[3] hardly fits the conditions of the 90's: it reflects the values of the 70's, envisions the traditional paternalistic doctor-patient relationship with little or no attention paid to patients' rights.

The major step in the reform process was the adoption of a new act addressing basic issues of health care (Act No. CLIV of 1997 on Health Care, adopted by

1 See more on this topic KOVÁCS, J.: *Medical Ethics Activities in Hungary. European Philosophy of Medicine and Health Care.* 1994, 2, 11–16.

2 Act No. II of 1972 on Health Care and the numerous related Decrees of the Government and the Minister of Welfare.

3 E.g. public health and the control of infectious diseases, organ and tissue transplantation, some basic rules of doctor-patient relationship, confidentiality issues, civil commitment of psychiatric patients, the rules governing medical products for human use, including the clinical investigation of medicinal products etc.

the Parliament on 15th of December 1997, most sections become effective on 1st of July 1998, some others on 1st of January, 1999). The new Act is aimed to cover a wide range of questions, however, despite being very long in extent, can only address basic principles and on many topics detailed regulation is allocated to decrees of the government or the minister responsible for health care. These decrees are currently under preparation, the content of them cannot be predicted yet. In the followings we will concentrate on selected topics of the new regulation, mainly on those which basically influence the position of the patient in the health care system.

Patient's rights

Very detailed regulation is devoted to the rights of patients. According to the Act the patients are entitled to the following basic rights:

Right to health care. In case of medical emergency every patient is entitled to life saving treatment, to health care which is aimed at preventing permanent deterioration of the health of the patient and to pain relief. Access to other health care services is bound to health insurance. The level of health care service the patient is entitled to depends on the health status of the patient, and the disease she/he suffers from. The health services shall be of the highest level on the basis of the current level of medicine, the level of technology and of the health care system, the currect circumstances and the expected knowledge and professional experience of the professional health care staff. The patient has the right to choose his/her physician and health care institution. The patient also has the right to a second medical opinion. Health care services which are not immediately available for every patient in need of them (scarce resources) have to be distributed upon waiting lists. The selection criteria from the waiting list have to be open to public and subject to public control. The patient is entitled to be informed of his/her position on the list.

Right to human dignity. Restricition of the rights of the patient during health care is justified if it is adequate and appropriate. Personal freedom of the patient can be restricted in case of emergency or for the protection of the health, physical integrity and health of the patient itself or of others. Restrictions upon the free movement of the patient can be ordered by a qualified physician in writing.

Right to maintanance of contact. In the course of health care patients are entitled to maintain continuous personal contact with their relatives and other persons. Such contact may not be limited to a few visits a week as determined by the medical institution. However, this right of the patient may not interfere with the operation

of the health care facility or the treatment of the patient and other patients. The Act enumerates three special groups of patients where further rights are guaranteed: patients in bad state of health (i.e. patients not able to care for themselves, patients in pains which is out of control by medication, and patients in emotional crisis situation) have the right that the person chosen by the patient can stay with them all day and night; minors (patient under the age of 14) have the same right; and women in labour have the right that the person named by them can stay with them during labour and—if it is medically not contraindicated—the newborn baby shall be placed in the same room where the mother is. These rights of patients sparkled hot debate among physicians, as—knowing the current technical conditions of health care institutions—it is very difficult to grant them.

Right to leave the health care institution. The patient has the right to leave the health care institution whenever she/he wishes, if life, health and bodily integrity of others is not endangered by it.

Righ to be informed. The question of informed consent has recently been a highly debated issue in Hungary. The act—for the first time in Hungarian legislation—spells out the meaning of informed consent: every person has the right to determine what will be done to his/her body, and to decide whether or not to undergo medical treatment. In order to make proper decision the patient needs to be fully informed of all the relevant facts—including the risks—related to the treatment considered. The act gives a detailed taxative list of the facts to be disclosed to the patient:

- the health status of the patient, including its medical evaluation;
- the proposed diagnostic examinations and treatments;
- the possible benefits and risks of the proposed examinations and treatments;
- the planned timing of the proposed examinations and treatments;
- the fact that the patient has the right to ask further questions and to make the decision concerning the proposed examination or treatment;
- alternative treatment methods;
- the process and possible outcome of the proposed treatment;
- further treatments;
- proposed life-style changes;
- after the completion of the examination or treatment the patient has the right to be informed of the result and outcome, and—if the treatment or examination was unsuccessful—of the possible reasons of it;
- the name, position and qualification of the members of health care staff providing care for her/him.

The information has to be understandable to the patient given his/her cultural and educational background.

The *exceptions* to the duty of disclosure are limited. In fact, there are only three situations in which the physician is permitted not to give full information: Firstly, patients who are not legally competent are only entitled to information appropriate in the light of their age or mental state. Secondly, if the patient waives his/her right to be informed, it has to be respected by the physician. And thirdly, in emergency situation the doctor may render treatment without the patient's consent and—if it would delay the initiation of the treatment and thus jeopardize the well-being of the patient—no disclosure is required. The concept of therapeutic privilige—which would permit physicians in selected cases to withhold information deemed to be of harmful psychological effect for the patient—is not acknowledged by the act.

Right to autonomy. The term "right to autonomy" in the Act describes the fundamental right of the patient to freely decide whether she/he whishes to undergo medical treatment or refuses it. As to formal requirements, written form is needed if the treatment or examination is an invasive one. In other cases verbal consent is enough.

Incompetent persons cannot validly consent to any kind of medical treatment, consequently making medical decisions in this case "has been an area of great confusion".[4] The Act tries to give clear guidelines who is entitled to make decisions on behalf of the legally not competent patient.

According to the Civil Code[5] of Hungary, there are two different grades of incompetence. A person is fully incompetent, if she/he is[6] a) under the age of 14, or b) is under full guardianship (adjudicated incompetent), or c) is not able to make decisions for himself due to his/her overall condition.

The Civil Code also distinguishes another grade of incompetence, the so-called "limited competence". It has to be clearly distinguished from the—in many jurisdictions well-known—term of specific incompetence, where the adjudication of incompetence and appointment of a guardian does not render the person incompetent for all purposes, just for limited purposes instead, which are indicated in the court order. Hungarian civil law does not know this term, both grades of incompetence are general in the sense that the person involved suffers legal disability in every kind of matters. The difference between incompetence and limited competence lies in the extent of the limitations placed on financial matters: while the fully incompetent person is not allowed to close a deal, make a legally

4 APPELBAUM, A. S.—LIDZ, CH. W.—MEISEL, A.: *Informed Consent. Legal Theory and Clinical Practice.* Oxford University Press, 1987, 81.

5 Act. No. IV of 1959 on the Civil Code.

6 Civil Code Sec. 15–17.

valid statement, the person under limited guardianship has the right to dispose over his/her financial matter up to a limit (typically one-month salary), and is allowed to make certain legally valid statements in agreement with his/her legal representative. Persons under the age of 18, but above 14 have the same legal positions as adults placed under limited guardianship.[7]

As to the right to consent to treatment the same rules apply to incompetent patients and to patients rendered limited competence. In both cases substituted decision has to be brought. The Act gives the right of making decisions on behalf of the patient to the legal representative and the relatives. If the decisions brought by certain relatives are contrary to each other, the act ranks the relatives: closer relatives living together with the patient are given priority. The decision-making competence of the relatives, however, is limited: it is restricted to the invasive procedures and if it would lead to the deterioration of the patient's health it should be neglected by the physician. In emergency situations, where the delay of initiation of the treatment would harm the patient there is no need of seeking the consent of the relatives.

Right to refuse treatment. The Act gives an unprecedentedly detailed regulation on the issue of refusing and withholding life-sustaining treatment, trying to build in guaranties by setting up strict procedural rules. This delicate issue, which involves the question of euthanasia, sparkled hot debates during the legislative process and this chapter underwent major changes during the debate in the Parliament. The Act distinguishes between three types of treatment:

a) "regular treatment",

b) treatment which if not given to the patient leads to serious or permanent deterioration of the health, and finally

c) life-saving or life-sustaining treatment.

The refusal of the three types of treatment is bound to different procedural rules and varies upon the competence/incompetence of the patient.

Ad. a. "Regular treatment" [treatment which does not fall under catergories b) or c)] can be refused by the patient with only one restriction: if the refusal of the treatment would jeopardize the health or life of others (which is the case for example with infectious diseases), the refusal is not valid.

Ad. b. The refusal of treatments which fall under this category is only valid if certain formal rules are kept. The refusal needs a written form, also signed by two independent persons or made in the presence of a notary. If the person is not legally/competent, this category of treatment cannot be refused either by the patient or by relatives or legal representative.

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7 Civil Code Sec. 12, 13.

Ad. c. Life saving or life sustaining treatment can only be refused under strict limitations: the patient has to suffer from a serious, incurable disease, which—even with proper medical care—within a short period of time leads to the death of the patient. (It means that for example a breast amputation or removal of inflammated appendix can not be refused.) If the patient expresses his/her wishes regarding the refusal of life sustaining treatment, further procedural steps have to be taken: a committee of three physicians has to examine the patient and decide whether she/he can be regarded competent, whether she/he suffers from a serious and incurable disease. After the decision of the committee a waiting period of three more days have to pass and if the patient still expresses his/her wish regarding the refusal, the treatment can be withdrawn. If the patient is not competent, and the legal representative refuses life saving or life sustaining treatment, the health care institution has to initiate a court proceeding.

The competent person has the possibility to write a so-called "living will", in which—for the case if she/he becomes incompetent for some reasons—she/he can specify, which medical treatments she/he wishes to refuse. This declarataion is valid only if a psychiatrist declares that the patient is fully competent. The declaration has to be renewed every two years.

Right to access to medical records. The Act states that the patient has the right to have insight in his/her medical records, ask for copies of the records—on his/her own expense.

Enforcement of patients' rights

Patients' rights can be safeguarded in various ways. Formal civil proceedings—disclosure malpractice lawsuits—are becoming more and more frequent in Hungary. The Act sets up special mechanisms to promote and protect patients' rights:

a) *Complaint procedure.* The patient has the option to lodge a complaint with the health care institution. Upon complaint the management has to investigate the case and inform the patient of the result of the investigation within ten workdays.

b) *Patients' rights advocate.* In each hospital an independent—i.e. not employee of the hospital—person has to serve as patients' rights advocate. She/he can help the patient to initiate complaint proceedings, has the right to call the attention of the management to deficiencies on the field of patients' right and initiate the improvent of these. She/he has access to the medical records of the patients.

Ágnes Dósa

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PREFACE

Public Interest, Spending and Individual Rights

This issue of Acta Juridica collects some of the papers presented at a conference series at Central European University.[1] The series, entitled "Individual versus the State" is dedicated to problems of regulation apparently or allegedly restricting the rights of individuals.[2]

In a welfare state perhaps there is nothing that affects the position of the individual more than government spending. This is the more so as individual rights are perceived by legislation and courts as well as something provided or at least promoted by government services which are determined by the understanding of the public interest and which are specified as spending items of the budget. Notwithstanding the insufficient constitutional review of the spending power and notwithstanding the deliberate uncertainties of the notion of public interest both in law and politics, it is obvious that these are key concepts blueprints for action. This is the consideration that unites the articles of this issue which offers the experience of a number of countries with special

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1 The conferences are sponsored by the Open Society Institute, Budapest. Support by the Open Society Institute for the publication of this issue is gratefully acknowledged.

2 Other publications of the conference series include: SAJÓ, A. and PRICE, M. E. (eds.): *Rights of Access to the Media*, Kluwer Law International (1996); SAJÓ, A. (ed.): *Western Rights? Post-Communist Application*, Kluwer Law International (1996); SAJÓ, A. and AVINERI, Sh. (eds.): *The Law of Religious Identity: Models for Post-Communism* (1998).

emphasis on the difficulties of the emerging democracies in Eastern Europe. But the new/old concerns of the public good are not only those that are felt in the world of post-communist welfarism (a special case of the bankrupt welfare state). Several articles of this issue are dedicated to the emerging understanding of the public good and its service which emerges under the latest version of the "third way".

Paul R. *Verkuil*'s paper (Understanding the "Public Interest" Justification for Government Actions) tells the surprising carrier of "public interest" in the United States. Public interest is perhaps the notion probably invoked more than any other to justify government action. The ways the concept was used and understood has changed over time but never offering enough guidance for the judiciary to make the review of government action fully predictable. In a way the story is different and the same in France. "The Case of France" is described by Guy *Carcassonne*. The French case is interesting because in not one single occasion the French constitution makers used the term public interest, although general interest is latently present everywhere, as the disguised God of Pascal and Kierkegaard. Gunnar Folke *Schuppert* (Responsibility Sharing in Public Policy: Who Defines the Public Interest in the Cooperative State?) indicates how the ancient concept of the Prussian common good is transformed into a core idea of "bringing the state back in" in the modern German system which is right in the middle of redrawing public/private boundaries. All that takes us to the "third way revolution" as is emerging in Great Britain. (See Michael *Adler*: Regulation and the Public Interest.)

Of course, the understanding of the public interest in the legislation enabling social rights has very special consequences not only in public administration but in regard to human rights. The related developments in Russia are analysed by Marat S. *Salikov* (Federal Constitutional Court: Human Right's Protection Approach and Public Interest). Justice Gadis *Gadzhiev* in his paper "The Interdependence of Economic and Social Rights" offers a critique of the understanding of these rights by the Russian Constitutional Court.

As mentioned above, the practical consequences and the real meaning of the concepts of public interest are to be found in government spending which is determined in the budget law. The budget is, of course, much more than simply the sum total of welfare related expenditure (although most of the public spending is welfare related in many countries). The paradox of the public interest lies in the contradiction between individual spending items and the balance of the budget, which itself represents a special public interest as this is exemplified in the Blankenagel—Pfersman exchange. (Alexander *Blankenagel*: False Friends and Real Friends in Budget Law, and Otto *Pfersmann*: Comments

on the paper of Alexander Blankenagel.) The public interest as expressed in the budget can be undermined both procedurally and substantively.

Alexander G. *Morozov* emphasizes the first one in the Russian context (The Budget Process in Russia: Problems and Solutions in the Context of Politics) while Dejan *Popovic*'s paper on Yugoslavia (Financing Social and Cultural Rights in Yugoslavia: Tax Exemptions and Arrears) looks at the problem from the perspective of tax expert. Here a new dimension of social rights protection is criticised, namely tax exemptions.

The present issue is intended to be an opportunity to develop a new constitutionalist and interdisciplinary approach to a hidden dimension of welfare and citizens' rights in Eastern Europe which is becoming intellectually reintegrated into "normal scholarship".

András SAJÓ

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STUDIES

Paul R. VERKUIL *

Understanding the "Public Interest" Justification for Government Actions

The words "public interest" are probably invoked more than any other to explain and justify government action, whether in delegations of legislative authority to agencies or in explanations by agency officials to the public. But these words are rarely self-actualizing; in some cases they seem virtually devoid of meaning. Still their use persists and it is worth asking whether they have been or can be interpreted to set some objective standard for evaluating government behavior.

While "public interest" was a favorite expression of New Deal Congresses and agencies,[1] its use emanates from the mists of time "immemorial".[2] However, it is no mere legislative sport of antiquarian interest. Recently, for example, the Federal Trade Commission released a letter sent three years earlier

* I want to thank my colleague Michael Herz for his many insights on this subject.

1 The public interest formulation, and its first cousin "just and reasonable" ratemaking, had been used earlier in the Federal Trade Commission and Interstate Commerce Acts, but the term became entrenched in administrative delegations during the New Deal.

2 Private property "affected with a public interest" was among the first kind of regulation emerging from the common law of England inn keepers, wharfmen and hackmen were "common carriers" who through the exercise of monopoly power in their trades became subject to public control. See Sir HALE, M.: *The History of Common Law of England* (C. M. Gray, ed.) 1971; See also *Maun v. Illinois*, 94 U. S. 113 (1877) (discussing relevance of "affected with a public interest" to United States legal development).

that informed Intel's Chairman Andrew S. Grove that the FTC was dropping its antitrust investigation of that company, but adding: "the Commission reserves the right to take such further action as the public interest may require".[3] Of course that "further action" occurred when the FTC reversed course and announced that it would convene antitrust proceedings against Intel in May 1998.

One wonders what insights Intel gained into the FTC's enforcement strategy based on its (or anyone's) concept of the public interest.[4] Could Intel know what activities might or might not run afoul of the FTC's mandates? Could Intel have avoided future prosecution by complying with the FTC's definition of the public interest? On the other hand, what does the FTC gain by adding the term? Could not they just have reserved the right to take further action?[5] As a practical matter, government action, while presumptively based on the public interest, is simply action based on the exercise of government power, a tautological exercise that raises problems of notice and bureaucratic efficacy. But perhaps the emptiness of "public interest" is not inevitable. Did it once have a better understood meaning? If so, what has happened to that understanding since that time?

The Public Interest, the New Deal and the Delegation Doctrine

The setting where the term public interest has been most consistently employed and challenged is in legislative grants of powers to administrative agencies. In the classic New Deal delegation, federal agencies were admonished to act in "the public interest, convenience and necessity".[6] Grants of power as agencies

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3 See "Intel and Microsoft Face Differing Antitrust Paths", *New York Times*, May 29, 1998. The earlier letter quoted in the text had been sent on July 14, 1993.

4 The FTC's causal use of public interest reminds one of Justice Robert Jackson's critique of the FTC's earlier use of the word "quasi": "'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to cover a disordered bed". *FTC v. Ruberoid Co.*, 343 U. S. 470, 487 (1952) (dissenting).

5 Some critics have suggested that the FTC sued Intel in reaction to the Department of Justice's case against Microsoft in an attempt to stay in the antitrust regulatory game. See JENKINS, H. Jr.: "How Intel's Good Deeds Get Punished", *Wall Street Journal*, June 17 1998, A17.

6 See DAVIS, K. C.–PIERCE, R. J.: *Administrative Law Treatise* § 2.6 (1994) for statutory references. It is an intriguing question what, if anything, the words "convenience" and "necessity" add to public interest. Surely if they stood by themselves we would worry more, not less, whether the "public interest" was being protected, since convenience and necessity

in these and similar terms were challenged as impermissibly delegating legislative authority to executive agencies. But challenges to the public interest standard did not succeed.

As is well known, the United States' Supreme Court has actually invoked the non-delegation doctrine on only two occasions, both in the 1930's.[7] But the problem of "delegation running riot", as Justice Cardozo phrased it in the *Schechter Poultry* Case, was not one in which the public interest standard was involved.[8] That standard seems always to have just cleared the bar set to satisfy constitutional challenges based on impermissible delegation of powers. The reason the public interest standard survived delegation attacks may have had as much to do with its administrative settings as with the nature of the delegated words. Public interest delegations were usually to independent agencies which had procedural protections in place that, coupled with substantial evidence judicial review, served to confine the scope of delegation. The NIRA cases, on the contrary, were broad discretionary delegations to the Executive and even to private parties.[9]

The Supreme Court had upheld the "public convenience, interest and necessity" standard contained in the Radio Act of 1927 in *Federal Radio Commission v. Nelson Bros.*[10] That case, also authored by Chief Justice Hughes, stated that "this criterion [public interest] is not to be interpreted as setting up a standard so indefinite as to confer unlimited power".[11] Later, in *National Broadcasting Co. v. United States*,[12] the "public interest, convenience and necessity" standard in the Communication Act of 1934 was interpreted in the course of rejecting a challenge to chain broadcasting regulations. Justice Frankfurter's majority opinion equated the public interest with securing "the maximum benefits of

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imply an offhand or arbitrary dimension to the exercise of government power.

7 *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *Schechter Poultry Corp. v. United States*. 295 U. S. 495 (1935).

8 *Schechter* involved industry codes (for, among others, Kosher butchers) promulgated by the Executive branch under the National Industrial Recovery Act, which made no reference to public interest. *Panama Refining* dealt with a section of the NIRA which delegated power to the President to deal with "hot oil". In that case, Chief Justice Hughes' majority opinion, which condemned the NIRA delegation, also defended the public interest, convenience and necessity standard contained in the Radio Act of 1927 (precursor to the FCC Act). 293 U. S. at 428.

9 See *Carter v. Carter Coal Co.* 298 U. S. 238 (1936).

10 289 U. S. 266 (1933).

11 *Id* at 285.

12 319 U. S. 190 (1943).

radio to all the people of the United States".[13] The Court rejected a narrower, technical and engineering role for the FCC in administering the Act in favor of a roving commission to act in the public interest over broadcasting.

The Communications Act has been the foster child for the public interest standard to this day. A few years ago Newton Minow, no naive observer, could seriously utter the following proposition: "The heart of the Communications Act is its clear emphasis on the public interest. Whatever the temptations to abandon this notion—and they are many—the stakes are too high. Without commitment to the public interest, all of government action vis-à-vis communications would be without meaning."[14] Mr. Minow, a New Deal lawyer who served as a powerful FCC chair, professes to find some consolation—and protection of the public—in the incantation of the public interest standard.

Obviously, the subjective nature of the standard in today's world makes it a less than reassuring justification of FCC action. Critics of the FCC's view of the public interest abound[15] and the courts are increasingly skeptical as well.[16] But my purpose here is not to argue about the FCC's success or failure applying the public interest standard. Rather, I want to ask whether observations of what the standard means were initially clear but have been lost in the years since it was first employed. Today, the interesting question is whether the public interest can ever convey a satisfying meaning given competing views about the role of government and the market.

The New Deal Faith in Government Regulation

In the 1930's the public interest triggered a largely agreed upon response from agency officials. As a result, New Deal Congresses employed the phrase partially because they "trusted" agencies to apply it in an enlightened fashion. This faith in administration may well explain New Dealer Newton Minow's belief in the standard's continued explanatory power. At a time when government officials

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13 *Id* at 1010.

14 MINOW, N.: *Commemorative Message, in a Legislative History of the Communications Act of 1934*, at XV (Max D. Paglin, ed.) 1989.

15 MAYTON, W. T.: "The Illegitimacy of the Public Interest Standard at the FCC", 38 *Emory Law Journal*, 715 (1989).

16 See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622 (1994) (5 to 4 decision) and related cases.

talked in terms of the "science of administration",[17] and regulation was performed by "independent agencies" (allegedly free of political influence), perhaps government could operate objectively to solve problems that the market could not. In this setting it was not surprising that the public interest held an assumed meaning. In cases like *FPC v. Hope Natural Gas, Co.*,[18] agencies were given a virtual blank check to create rates that were "just and reasonable".[19] Delegation of complicated decisions to talented regulators overseen by the courts was clearly seen by those same courts to be part of the calculation that produced the public interest.

In many respects, the New Deal period was driven by the post-*Lochner* view that the legislature should have a free hand in making the social choices inherent in the regulatory state. This view, in turn, was inspired by Justices Holmes and Brandeis who gave it voice, dignity and direction. Holmes' famous dissent in *Lochner* set the stage for later judicial receptivity to legislative delegations that Brandeis explored in cases like *Muller v. Oregon*.[20] But Holmes and Brandeis, for all their mutual admiration, were an odd pair. While they often voted together, Holmes, as a positivist, put no stock in legislative wisdom, whereas Brandeis was a true believer in the state as an instrument for achieving the highest good.[21] Brandeis often identified the public interest as part of scientific administration.[22] He had an enormous impact on the whole generation of New Deal lawyers; indeed Louis Brandeis as a lawyer probably became the model for the public interest advocate. The tools he used to

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17 J. M. Landis in *The Administrative Process* 41 (1938) offers a good example of the optimism with which New Deal leaders approached the regulatory state. Dean Landis refers to the "science of administration" (a phrase borrowed from Gerald Henderson) as a basis for setting standards to guide administrative behavior. He also emphasized his belief in the value of expertise, by which he meant smart Harvard-educated lawyers who could puzzle out where the public interest lay in any number of regulatory structures.

18 320 U. S. 591 (1944).

19 *Hope* was authored by Justice William O. Douglas, a former New Deal administrator who lost several of his colleagues by including that "just and reasonable", like Justice Stewart's view of pornography, was in the eye of the FPC as beholder. Justice Frankfurter, dissenting, concluded: "Expertise is a rational process and a rational process implies expressed reasons for judgement." *id* at 627.

20 *Lochner v. People of State of New York*, 198 U. S. 45 (1945), *Muller v. State of Oregon*, 208 U. S. 412 (1908).

21 Alexander Bickel has written perceptively about the Holmes-Brandeis interaction in this regard. See BICKEL, A.: *Unpublished Opinions of Justice Brandeis*, 220–225, 1957.

22 Brandeis often cited the works of Gerald Henderson, the constitutional-administrative law scholar who was the architect for the science of administration approach. *Id.* at 152–153.

construct the public interest were economic analysis, financial acumen, and an inherent sense of fair play. It may be that the New Deal faith in the public interest stemmed as much from respect for Louis Brandeis as from commitment to the ideas of Franklin Roosevelt.

Moreover, New Deal lawyers in government had a better sense of the "public interest" than we do now because they were more firmly rooted in the public law tradition. Many of the young law school graduates who participated and in some cases created government agencies did so with less thought of serving private interest at a later time. The public sector was where the action was and they were often committed to a career in government. Moreover, these lawyers were produced by a small set of institutions—Harvard, Columbia, Yale and to a lesser extent Chicago law schools—and their teachers were mostly legal realists who themselves served in government.[23] Surely attorneys like Tommy Corcoran and Dean Acheson had influential legal careers in private practice, but many of the government lawyers stayed in government (either in executive or judicial roles).[24] They had more occasion than their modern counterparts to identify their careers with notions of public service. And in this sense, they helped to define the term through then shared understanding. Today the revolving door from government to the private sector and back is a far more prevalent course.[25]

The Meaning of Public Interest Today

Surely we do not have a shared view of the public interest today. New Dealers were motivated by redistribution goals and the utilitarian concept of greatest good for the greatest number.[26] Today counter concepts like positivism, legal

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23 See IRONS, P. H.: *The New Deal Lawyers*, 6–7, 1982 (over 60 percent of the more than 500 lawyers serving in key New Deal agencies and the Justice Department graduated from those institutions—most of them from Harvard).

24 Lawyers like Adolph Berle who served as a member of Roosevelt's "Brains Trust" and later returned to an academic career at Columbia, and Felix Frankfurter, who produced many New Deal lawyers at the Harvard Law School before serving on the Supreme Court, were good examples. See ROSEN, E. A.: *Hoover, Roosevelt and the Brains Trust,* 1987.

25 Modern lawyers are public servants only part of the time and they come from much wider educational backgrounds. Their views of the "public interest" are in all likelihood conditioned by the private clients they have or will serve outside government. Thus, the need for complicated ethics laws that set rules of engagement and disengagement.

26 See TUGWELL, R. G.: *In Search of Roosevelt,* 1972.

realism and public choice provide more nuanced but also more cynical critiques of government performance. Public Choice theory, by equating public interest with private interest, makes faith in the objectivity of the public interest (even in government itself) especially difficult to maintain.[27] Once government actions are viewed as no less self-interested than private ones, vague concepts like public interest cease to receive deference. Concepts of government failure now vie with New Deal assumptions about market failure to undermine ambitious government programs. Even the Democrats succumbed when President Clinton declared that the era of big government was over.[28]

But even today, a few positions in government still cling to an independent notion of the public interest, in the sense of serving the interests of the general public. One bastion of the public interest is the Solicitor General in the Justice Department, who has always maintained that fealty to the law (and the rule of law) is a responsibility independent of the political interest of the President who appointed him or her. Francis Biddle captured this spirit when he commented: "The Solicitor General has no master to serve except his country."[29] The assumption that the rule of law can be derived apolitically is a big one,[30] but it is deeply entrenched. It demonstrates a view of the public interest that seems more to be assumed in the nature of the office than articulated anew each time the incumbent changes. In this context, public interest has become a synonym for the rule of law, which helps to give the term some content and limits. Surely some would still say it simply substitutes one vague phrase for another. But at least it narrows the range of doubt. We know generally what the rule of law in our society is, and even in Western civilization more generally.[31] Its protection is a worthy undertaking. An executive branch official who behaves like a member of the judiciary in defining the rule of law is a remarkable figure in any society.

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27 See, e.g., BUCHANAN, J. M.–TULLOCK, G.: *The Calculus of Consent,* 1962.

28 President Clinton speaks of our "post-big government" federal system. Radio Address to the Nation (Jan. 27, 1996).

29 BIDDLE, F.: *In Brief Authority,* 98, 1962. See also CAPLAN, L.: *The Tenth Justice: The Solicitor General and the Rule of Law,* 1987.

30 For some counter views see SOLOKA, R. M.: *The Solicitor General: The Politics of Law,* 1992. See generally *Government Lawyers, The Federal Legal Bureaucracy and President Politics* (Cornell W. Clayton, ed.), 1995.

31 The Rule of Law has an agreed upon meaning in Anglo-American jurisprudence. It is premised on an independent judiciary and concepts of natural justice. See VERKUIL, P. R.: "Cross-Currents in Anglo-American Administrative Law", 27 *William & Mary Law Review,* 685 (1986).

But we are still hard pressed today to define the public interest more broadly. A case just decided by the Supreme Court, where the rights of private property clashed with an expression of public interest, points out the difficulties. In *Phillips v. Washington Legal Foundation*,[32] a Texas Interest on Lawyers Trust Account (IOLTA) setup to fund legal aid was challenged as depriving clients of a property right in their accounts. It was stipulated that this right was purely theoretical since, in absence of the IOLTA program and federal regulatory provisions, there would have been no interest paid on these accounts. Nevertheless, Chief Justice Rehnquist, for a five member majority, found private property principles controlling. He held for the Court that the maxim of English law that interest follows principal provided the rule, even if the interest was nonexistent. In doing so the majority rejected the argument of the United States (by the Solicitor General) that IOLTA accounts were "government created value", not private property.[33]

The case was remanded to the circuit court to decide whether, once it was established that private property existed, a taking under the Fifth Amendment had occurred.[34] The four dissenters offered two opinions: Justice Souter argued for remanding to decide the Takings clause issue and Justice Breyer, joined by Souter, questioned the private property analogy in a situation where the state (IOLTA) programs were the source of value creation.[35] Thus the 5 to 4 split in the Court was created by competing conceptions of private versus public property, or for my purposes public versus private *interest* (no pun intended).

What was at stake in *Phillips* was the legal aid program itself—whether Texas could spend private funds to achieve public goals. Thus, this case nicely raises the issue of what the public interest means in today's world. The public purpose the IOLTA program sought to serve was to provide legal aid for indigent clients. Aggregation of these accounts raised the remarkable sum of $100 million nationwide to provide subsidized representation. It was defended in briefs by 49 State Supreme Court Chief Justices (only Indiana did not have such a program), and by the American Bar Association. They all believed that the program created a new public value without depriving any individual of private property. Thus we have a context for the public interest not simply transferring

32 1998 WL 309070 (June 15, 1998).

33 *Id* at 7.

34 Under the Fifth Amendment, if "private property" is taken for a "public use" the state must provide "just compensation".

35 Justice Breyer rejected the Chief Justice's use of the interest follows principal maxim as too limiting.

property from one owner to another but actually creating a new public value—a Pareto optimal result.[36]

Moreover, if one believes with the Solicitor General that at the minimum the public interest equates with the rule of law, then a fund that allows people to be represented also supports the rule of law dimension of the public interest doctrine. This allows us to give meaning to the ambiguous concept of public interest.

The question is why the majority in *Phillips* saw a need to protect a purely hypothetical private (property) interest in the face of a real and substantial public interest. Perhaps the answer lies in what has become a zero sum view of the role of government. During the New Deal, public rights such as Social Security were seen as being justified by their redistribution effects. Small amounts of taxes paid by all could provide a universal social safety net. But if it is believed that private funds transferred to the public serve no social purpose, there is no inherent benefit to government action. Lester Thurow talks in terms of the Zero Sum Society where some must be made worse off to make us more competitive in the future.[37] In this view, public interest becomes closely aligned with the private interest.

But of course we have not yet reached the point of equating private and public interests. Public goods still exist and the market by definition does not solve problems of non-transactional costs.[38] If the failure to provide access to justice for the poor is viewed as a market failure or a social cost, the *Phillips* case could have been decided on a public interest rationale. As Justice Breyer noted in his dissent,[39] the rights of private property asserted were limited only to the "right to keep the clients' principal sterile" (to prevent its use by others). That is surely a flimsy property interest when placed against the public interest of providing funds to secure legal aid for the poor. It could be viewed as a de minimis private property right. The case must still take several steps before a constitutional taking is established, so it may yet be possible for a public

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36 Pareto optimality occurs when someone (here legal aid recipients) can be made better off without making anyone (here clients' with principal) worse off.

37 THUROW, L.: *The Zero Sum Society*, 1980; *The Zero Sum Solution*, 1985. Professor Thurow uses the zero sum approach to explain how we must invest to compete on a global basis. He urges the use of public funds to stimulate investment, but does not favor central government planning and recognizes that there are inevitably winners and losers in any transition to global competitiveness.

38 See HARRISON, J.—MORGAN, Th.—VERKUIL, P.: *Regulation and Deregulation*, 191–209, 1997.

39 *1998 WL 309070*, at 14.

interest argument to emerge. If it does, a better definition of the public interest might emerge as part of the public use dimension of the Takings Clause.

Conclusion

All democratic societies must justify government action by reference to some concept of the public interest. In the United States, that process has long been established. At a time of active or positive government such as the New Deal, the "public interest" justification becomes a familiar legislative technique. Whether or not its meaning is clearly understood, the courts have accepted it as a delegable standard to agencies. In today's setting, "public interest" probably gets closer scrutiny than it can withstand, and its survival is less obvious. Standing alone the term looks inadequate, but tied to tradition and history it takes on sufficient independent meaning to survive delegation challenges. The truth is there may be no better way to describe public action. Recent statutes that provide detailed legislative guidance to agencies suffer other infirmities.[40] The public interest will always be an elusive concept because government action is inherently discretionary and subjective. But we accept that the rule of law (in the form of judicial review by the courts) is sufficient to "canalize" vagrant delegations. Thus in our system the public interest and the rule of law are ultimately connected and mutually supporting concepts. Perhaps that is the most that can be offered by way of a definition of the term itself.

40 See DAVIS–PIERCE: supra note 6, at 68–72, for examples such as the Clean Air Act and the Occupational Health and Safety Act.

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Guy CARCASSONNE

The Case of France

In France, formally, the general interest[1] does not exist. In none of the 87 paragraphs of the current Constitution, nor in its Preamble, is the expression present.

The current French Constitution took over the Preamble of the previous Constitution, that of 27 October 1946; the Preamble also has constitutional value. But none of the 18 sections of this text, however, which deals with problems considered major after the Second World War, makes the slightest allusion to the public interest.

The 1789 Declaration of the Rights of Man and of the Citizen, the final document in the French constitutional arsenal, and the first one in chronological order, is almost silent about the public interest. There one finds, at the most, in paragraph 17, a mention of „the legally apprehended public necessity", the only one that, with the reservation of a fair and preliminary indemnity, could endanger the right of property, presented otherwise as holy and inviolable.

Seventeen paragraphs of 1789, eighteen of 1946, eighty-seven of 1958, and in not a single one of these 122 provisions did the drafters deem it useful to mention a notion that is at the heart of public law.

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1 Except in cases where I specify differently, I will use the expressions of "general interest" and "public interest" as synonyms.

Is this because it was so evident that it was needless to express it? This is the first element of the answer. After all, if the general interest does not exist, what is a state good for? And if the state is useless, why do we take pains to give it those rules, procedures and limits, which are the essence of a constitution?

In this light, the general interest exists long before the state and the constitution of the state. These have no right to bring it into existence, but only to draw its limits, which have to be respected, whether it is a question of the limits of man's and citizen's rights, or the limits of democratic procedures.

Therefore, the general interest is not lacking in French constitutional texts. On the contrary, it is latently present everywhere, as the god of Kierkegaard, a disguised presence sometimes easily revealed.

So, when paragraph 2 of the Declaration of 1789 states that "The goal of all political associations is the preservation of Man's natural and imperishable rights', one can judge this conception naive, restricted or weak, but one cannot deny that "political association" in general refers to a goal, and that this goal of the social pact, concluded on this occasion, differs from each individual participant's goals.

The original text hides other signs: it evokes "common utility" in its first paragraph, "actions harmful to the society" in paragraph 5, "public order" in paragraph 10, "public force" in paragraph 12, "public administrative expenses" in paragraph 13, and "public contribution" in paragraph 14. All of these expressions imply the existence of obligations which differ from the obligations of individual citizens, even those added later.

In the end, however, the most tangible source of the notion of public interest can be discovered in the turn of the phrase which closes the first point of the preamble of the Declaration of 1789 with an unexpected reference to "the welfare of all".

Theoretically, this welfare of all can arise harmoniously from the conjunction of the welfare of individuals. Practically, this optimism is denied by the Declaration itself: when it envisages, for example, the legal safeguards that each individual has to enjoy in the penal procedure, it presupposes deviant behaviour—crimes or misdemeanours—the hypothesis of which is sufficient to exclude the possibility of men who are naturally good, or intend to become good again or want to remain good.

Furthermore, the welfare of all is not limited to the living. It incorporates future generations, whose right to the welfare is the same as that of present generations. This notion assigns, therefore, without limits in the continuity of

mankind, a goal which goes largely beyond the horizon bounded by the ambitions of individuals, which extends even to their children and grandchildren.

From that moment, implicitly but necessarily, the Declaration of 1789 gives a foundation to the notion of the public interest based on at least two pillars: the necessity of organizing the present life and preserving future life.

Once a constitutional source of the general interest is so identified, all that we have to do is draw the outlines and define the effects.

In the French conception, the public interest has a special importance in that its pursuit is an element of the legitimacy of administrative activity: this goal justifies the existence of the administration and ensures that special means are suitable to it; it is obligatory (the administration must pursue the general interest); and it is absolute (the administration can pursue only the general interest).

For this reason, to disregard the public interest or to exceed what it requires is to make the administration lose its legitimacy, and consequently, to make it overstep the bounds of legality: no administrative activity other than that aiming at the goal of the general interest is legal.

That means that the question is rather postponed than solved. Who actually defines the general interest, with what competence, according to what criteria? In order to answer these questions, we have to leave the realm of the absolute and enter that of the relative.

The notion of public interest, as the French doctrine raises it again,[2] has a double meaning: political and administrative. In the political sense, the public interest is defined first of all by the fact that it arbitrates, in the form of decision by a public body, between divergent particular interests of the society. The public interest is sometimes determined according to quantitative criteria (the interest of those who will be expropriated must yield before the interest of a greater number of people who will gain by the existence of a new highway), sometimes according to qualitative criteria (the claims of dignity and solidarity justify that all people must be taxed in order to finance a minimal income paid to a small number). But it follows from this, first and foremost, that "looking at different times and countries, we see that quantitative and above all qualitative criteria are applied differently. Therefore, the notion of the public interest is not invariable in time and space."[3]

2 VEDEL, G.–DELVOLVE, P.: *Droit administrative*. Paris, 1990, Vol. I, 512.

3 *Ibid.* 513.

And that is how the juridical dimension of the notion of the public interest enters into the matter. It determines who is actually competent to enforce the decision and consequently to draw the contour lines of the general interest, and, if necessary, to re-draw them. It points out who is competent to oversee the decision so made and, if necessary, to ensure that it will be respected.

Three powers are involved: the drafter of the constitution, the legislator and the administrator. These are to be found in all democratic countries, but with very fine differences, so that the part of each of these powers is reduced or expanded according to national traditions and idiosyncrasies.

These are the three levels to be examined by turn, in the firm understanding that, since these three are not equally important in the case of France, their treatment is not equal either.

1. The general interest and the constituent

The constituent power, as we have seen, always appears to be reticent on the matter. In contrast to the others, it chooses to delineate the rights of the citizens and keep quiet about their duties. Desirous of expressing freedom, it does nothing but imply constraints that draw the borders of liberty.

This fact was of no great importance until the institution of constitutional supervision came into being. The legislator interpreted the Constitution more or less in his own way, defended freedoms as he understood them, and assigned to them the limits that he himself set, on the basis of his own decision.

But the creation of the Constitutional Council in 1958, the manner in which it began to work in 1971, and the enlarging effect of its functioning in 1974, modified the situation profoundly. It very quickly found itself in an ambiguous position. On the one hand, it was necessary to guarantee constitutional level principles and rules, intended to defend the citizens and expressed in the texts that the Council had to apply, against the misapplication of the principle of the general interest. On the other hand, it was also necessary to reconcile these with other principles and rules, of equally constitutional level, which protected the general interest. This second and more thankless task was additionally complicated by the reticence of the Constitution on the matter. Because of this, the Council sometimes had to interpret certain principles in the light of the public interest, which will be called the implicit preserve of the public interest (1.1), sometimes even to fill up the hiatus in the texts by formulating a principle of this general interest, opposed to a formally sanctified principle, which will be called the unwritten public interest (1.2).

1.1. The implicit preserve of the general interest

Two examples will illustrate this notion and measure its scope.

The first example relates to the principle of equality. It is one of those most sanctified by the constitutional texts,[4] and, at the same time, one to which the French people are most passionately attached. In addition, its violation is the grievance most frequently invoked before the constitutional judge.

This situation led naturally to the specification of the principle's scope and, in order to do this, led also to the elaboration of grounds of principle to be employed in each case when a decision had to be made. According to this, the principle of equality "is not in opposition either to the notion that the legislator handles different situations differently, *or that he slights equality for the reason of the general interest*, provided that the difference of treatment resulting in the two cases is related to the subject of the law establishing it."[5]

So, since 1979,[6] the Constitutional Council has admitted that even the sacrosanct principle of equality must yield before the general interest. Certainly, it assures that the general interest invoked is in fact present and real. Certainly, it verifies that the difference of treatment is, in fact, well related to this general interest and that it is not excessive in comparison with the goal the legislation is designed to reach.[7] But it remains true that the current interpretation, as indicated by the many various manifestations of it admitted by the Council[8] has led the Council to accept many sacrifices on the altar of the general interest.

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4 Being proclaimed in the first paragraph of the Declaration of 1789, it can be found again in several other dispositions of the same text (paragraphs 4, 6 and 13). It appears again in the third, thirteenth and seventeenth sections of the Preamble of 1946. Finally, it is solemnly re-affirmed in the first paragraph of the Constitution, and mentioned in its third paragraph.

5 This explanation appears, for example, in Decision CL 87-232 of January 7, 1988. (My italics.)

6 Decision CL 79-107 of July 12, 1979.

7 As an example of manifestly excessive rupture of equality, even in regard of a legitimate objective of the general interest, see decision CL 85-200 of January 16, 1986.

8 For example, the good functioning of justice (CL 80-127 of January 19 and 20, 1981), the continuity of public service (CL 87-229 of July 22, 1987), the defence of the special nature of the agricultural bank (CL 87-232 of January 7, 1988), the goal of the fight against excessive alcohol-consumption (CL 90-283 of January 8, 1991), the regrouping of electoral consultations (CL 93-331 of January 13, 1994), or finally the permanent harmonisation of the pension-system (CL 94-348 of August 3, 1994), especially the incitement of certain categories of wage earners to take early retirement (CL 96-380 of July 23, 1996).

The second example of what is called here the implicit preserve of the general interest relates to another fundamental principle, the principle of security,[9] in the juridical sense of the term, and especially in the case of the principle of non-retroactivity.

In the economic area, it is frequently the case that the legislator, wanting to incite actors to a behaviour that he estimates advantageous for the general interest, offers long-term financial benefits. It is in regard to these benefits that the actors make their choices. Therefore, they have the right to expect that the state will not revoke the promise that it gave when it promised the financial advantage.

Public power, however, does not hesitate to revoke its promises and sometimes to cancel an advantage before the persons to whom it was aimed could have the opportunity to profit from it, although the existence of the given advantage motivated their choices.

The Constitutional Council did not raise an insurmountable objection to this. At first it asserted dryly that "no principle or rule of constitutional level forbids the law to revise an acquired exemption under the aegis of an earlier law, or to reduce its duration."[10] In a little more nuanced way, it then added that "the legislator can, *for reasons of the general interest*, retroactively modify the rules that the fiscal administration and the tax-court are assigned to follow".[11]

Certainly, it imposes some limits on the use of this faculty,[12] and denies that the consideration of financial interest alone constitutes a sufficient motive of the general interest,[13] but it remains true that in this way the constitutional judge admits that, in the name of the general interest, the tax-payers can suffer very bad surprises by discovering a posteriori that they must pay over and above what had been announced to them legally, and what they legally paid.

We can see now, through the examples of equality and non-retroactivity, that a principle can include an implicit preserve of the general interest which, in the eyes of the constitutional judge, allows him to limit or subordinate the principle concerned to the general interest, without contradicting it.

To all of this, which is already no small thing, jurisprudence added the unwritten public interest.

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9 Presented by paragraph 2 of the Declaration of 1789 as one of the "natural and imperishable rights", just like freedom, property and resistance to oppression.

10 Decision CL 83-164 of December 29, 1983.

11 Decision CL 86-223 of December 29, 1986. (My italics.)

12 Respect for the object of judgement (*ibid.*), infringement of rights of property (decision CL 91-298 of July 24, 1991).

13 Decision CL 95-369 of December 30, 1995.

1.2. Unwritten public interest

The question here is not, as in the former case, how to incorporate the public interest into the interpretation itself of a principle. The matter is to reconcile a principle with a public interest that is external to it.

This raises no difficulty when this external public interest is represented by a formally sanctified constitutional principle. So, for example, the right to strike, a constitutional principle,[14] must necessarily be reconciled in the name of the public interest, with the equally constitutional principle[15] of the protection of health.[16]

A totally different case is when the Council must discover a public interest of constitutional value which, though unwritten, must limit the scope of a written constitutional principle.

The first time the judge followed such a procedure was July 25, 1979. In that case, after underlying the importance of "safeguarding *the general interest* for which the strike can be of such a nature as to endanger it", he set against the right to strike "necessary limitations in order to ensure the *continuity of public service* which, as much as the right to strike, has the character of a principle of constitutional value".[17]

It is true that paragraph 5 of the Constitution entrusts the President of the Republic with ensuring *"by his own decision ... the continuity of the state"*,[18] but the continuity of public service is nowhere mentioned.

In the same manner, but in a totally different field, two years later the Council observed that *"the pursuit of violators of the law and the prevention of assaults on public order, namely assaults on the security of persons and goods, are necessary for executing the principles and rights that have constitutional value."* The Council deduced from this the constitutionality of a procedure for identity-verification which does not infringe personal rights, or rather only to a limit that is "necessary safeguard to the *goals of the general interest* having a constitutional value, and the pursuit of which motivates the procedure."[19]

In this way, the legitimacy of the restriction and of the means to render it effective have been raised to the level of a constitutional norm whose existence

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14 Sanctified by the seventh section of the Preamble of 1946.

15 Sanctified by the eleventh section of the Preamble of 1946.

16 Namely, this is what the Council affirms in its Decision CL 82-144 of October 22, 1982.

17 Decision CL 79-105. (My italics.)

18 Without, however, giving it any particular power to achieve it.

19 Decision CL 80-127 of January 19 and 20, 1981. (My italics.)

can justify that, in the name of an unwritten general interest, some limits should be established to the exercise of individual liberties (provided that these limitations will not be overly restrictive, which must be verified by the Council).

Our third example: in the same spirit, the Council underlined with particular vigour that "exercising individual liberties and rights cannot excuse financial fraud, *nor can it obstruct the legitimate repression [of that fraud]*".[20]

In this way, a public necessity appeared to curb financial fraud, which not a single constitutional text envisaged. The Council deduced it from other provisions and gave it a value in the hierarchy of norms that puts it on the same level with individual liberties and rights, enabling it even to thwart the exercise of these.

In these three examples—the continuity of public service, the requirement of maintaining public order, the necessity of combating financial fraud—the constitutional judge was led to fill up the silence of fundamental laws. He has employed the laws to make them assert, through him, principles drawn from the general interest that no one, especially not the legislator, could totally misunderstand or sacrifice.

This procedure was not self-evident, especially in a country that is cautions about juridical creations. But one should also recognise that the invocation of the general interest by the Constitution was made in connection with subjects that could call on the help of evidence. Constitutional texts were mainly engaged in guaranteeing what was not self-evident without them—the respect of liberties and rights—and they were less involved in proclaiming certain requirements of the general interest—maintaining order, curbing fraud... Certainly this is not because they were not aware or concerned with these, but rather on the contrary, because their existence was self-evident. So, the Council created far fewer principles than the number whose evidence it proved.

Now, after defining certain constitutional restrictions resulting from the general interest, it remains yet to examine how they are set in motion by the person who is competent to do this, that is to say, the legislator.

2. The general interest and the legislator

The Constitution, as interpreted by the Constitutional Council, determines a set of principles that the legislator is obliged to respect, reconciling them in case of need. But the area so delineated, in which Parliament can move more or less

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20 Decision CL 83-164 of December 29, 1983. (My italics.)

as it likes and, in given cases, make its own conception of the general interest prevail, remains too large.

Does it mean that a statement of the pursuit of the general interest alone is sufficient to enable Parliament to take whatever steps it likes? Not exactly. If it is actually true that Parliament has a very large scope of interpretation (2.1), it also must completely assume the responsibility that accompanies its exercise (2.2).

2.1. Interpretation of the public interest

Over a period of some years, the French Parliament invoked the public interest first to nationalise (1982) and then to privatise (1986). So two weighty and totally contradictory measures were carried out under the same banner. That is to say: rights authorise the most divergent ideological assumptions.

As it has already been mentioned, the political notion of the general interest is actually very fluid. It qualifies not an object—which would have a proper and objective existence that could be proved by everyone—but rather a choice, contestable by nature, revocable by definition. Therefore, you cannot ask what the general interest is unless you immediately ask who is the authority that is legitimately able to define and oversee it.

The part of the legislator appears then very quickly. It is he and he alone, at least in the French system, who has in the constitutional framework the right to define the general interest. To paraphrase a well-known statement, even assuming that there can be a scientific definition of the public interest, it remains that the legislator has a monopoly on its valid definition.

This statement alone suffices to render useless all discussions of the cogency of the choices that Parliament carries out, or the question of whether the decisions mediating among different interests are or are not wise, satisfactory or efficacious. In fact, the authentic interpreter of the general interest is an institution elected by universal suffrage, responsible to the electors, and on this double title suited to make decisions in their name.

Anyone has the perfect right to contest the decisions made, the use of the notion of the public interest, as well as all other notions. But this dispute has no other channels than democratic, especially electoral procedures.[21]

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21 A way out that French people seem to use after all with a particular severity, as for nearly twenty years all parliamentary majorities, whether of right or left, have been defeated on the occasion of each of the general legislative elections.

Certain elements of the general interest, as we have already seen, have a constitutional value, and Parliament cannot break away from these. But the others, all the others, correspond to an exclusively legislative definition, and the only possible sanction of them is electoral and not juridical.

This is the position that the Constitutional Council has maintained by reproducing a moderate and definitive formula in a number of decisions since 1975, according to which the Council itself "*does not retain a power of interpretation and decision identical with that of Parliament*".[22]

In these conditions, once the constitutional judge verifies that no constitutional principle has been misunderstood and that, in the given case, those principles which had to be reconciled were so reconciled, and in a balanced manner, the task of the constitutional judge is over. Whatever his own conception of the general interest, even if it radically differs from that of the legislator, the constitutional judge cannot substitute his interpretation for that of Parliament.

For this jurisprudence, as it respects the power of Parliament, there is but one possible limitation. If the judge does not have the power to substitute his own interpretation for that of the legislator, he has the duty to reprehend possible "manifest errors of interpretation". The power of Parliament is discretionary. It is not sovereign. It can do much but not everything. Accordingly, it cannot permit a general interest to be invoked, a necessary juridical ground for the measures involved, which would not exist manifestly or would not manifestly be what one claims it is.

Potentially, therefore, the constitutional judge can recover with the one hand (control over manifest error) what he gave up with the other hand (power of discretionary interpretation of Parliament). But in reality, manifest error is a judicially circumscribed hypothesis in cases in which the error is plain, large, incontestable, and perceptible even for the most poorly informed. So, while mentioning this in several claims in its decisions[23] but never pronouncing repeal up to now on this basis, the Constitutional Council just took, without modifying its jurisprudence, a precaution which permits it to censure the eccentric decisions of a foolish legislator. But short of this, the judge abstains from rectifying the interpretations of Parliament. This permits us to conclude on this point that the foolishness of the legislator would be unconstitutional, but his simple idiocy would not!

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22 Decision CL 74-54 of January 15, 1975. (My italics.)

23 For example, Decision CL 81-132 of January 16, 1982.

2.2. *Responsibility of the public interest*

From the moment that it is recognised, with the reservations previously indicated, the legislator's wide-ranging competence to interpret the existence, the scope and the effects of the public interest is counterbalanced by his obligation to completely exercise that competence.

In a general manner, the Constitutional Council censures all cases in which the legislator "falls short of his competence", when he hasn't adopted sufficiently precise rules and has left to the executive power decisions that normally belong to Parliament.

This jurisprudence, called the *"negative incompetence"*[24] is not directly attached to the notion of the public interest, insofar as it mainly refers to the constitutional provision governing the distribution of competencies between the law and the administrative ordinance, and their relative weight.

However, there are cases in which, implicitly but clearly, the Constitutional Council censured Parliament for not having defined precisely the consequences attached to the adopted provisions with regard to the satisfaction of the general interest.[25]

In this way, after admitting that Parliament, in the name of the general interest that it determines, has the right to institute a servitude on certain real-estate, it emphasises that "it was incumbent on the legislator to determine himself the nature of necessary guarantees...; that lack of having instituted a procedure of information and of claims provided with reasonable dates or any other means designed to remove arbitrary risk", Parliament has not exercised the competencies that belong only to it.[26]

In the same manner, while the legislator can, in the name of "constant and particular imperatives of public safety", provide for a geographic extension of certain types of police control, he "misunderstood his competence if he delegates to the regulation power the task of defining this extension".[27]

So, if the public interest is in question, the legislator alone has competence to define its nature, content and effects, but he has equally the competence to define precisely the whole nature, the whole content and all the effects.

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24 FAVOREU, V. L.–PHILIP, L.: *Les grandes décisions du Conseil constitutionnel*, Paris, 1997, 211.

25 For example, Decisions CL 83-162 of July 19, 1983, CL 93-322 of July 28, 1993.

26 Decision CL 85-198 of December 13, 1985.

27 Decision CL 93-323 of August 5, 1993.

Therefore, if he has significant power, the obligation is incumbent on him to assume completely the responsibility for its exercise, without the possibility of passing it to someone else.

From this point, the circle is closed logically: it belongs to the citizens to elect their representatives, and it belongs to the representatives alone and entirely to define and to impose the public interest. Consequently, they assume before the citizens the entire responsibility for the decisions that they make. If the citizens disapprove of the choices of the parliamentarians, they can only blame themselves for having elected them, and they alone can replace them on the first occasion. If, on the contrary, they approve of these choices, they agree in advance with the constraints that these choices lay upon their particular interests.

Such a representation can be considered abstract or theoretical. But beyond its logic, in France it seems to be preferable to everything else.

3. The general interest and the administrator

France has adopted traditionally an encroaching conception of the public interest. As the presentation of authority before 1789, as the guarantee of equality after 1789, the pursuit of the general interest not only legitimated, but even demanded an omnipresent and omnipotent administration, charged, in the name of the State, to assure the satisfaction of the general interest against the continual siege of particular interests, assumed always as egoistic.

After several centuries of permanent strengthening, through monarchies, empires and republics, it is only since the 1980's that a reverse trend has operated. As a result, the public sphere has been divided and contracted.

It has been divided as an effect of decentralisation, which dates back to 1982. This reform has not made the notion of the public interest lose its importance. But it has made the state lose the monopoly of its definition. Henceforth, each local collectivity is in part the master of its general interest. And the fact that those in positions of responsibility are closer to those they administer than the state is, leads them to try to make a more prudent and more circumspect usage of the power that they have in imposing constraints in the name of the general interest. Step by step the power of arbitration has been refined.

As it was divided, the public sphere was also contracted. The double movement of privatisation and of deregulation, induced by both economic and European necessities, made the pursuit of the general interest lose in all related fields the whole or a part of the primacy that it had earlier enjoyed. To give a simple example, the general interest that authorised strict control of prices until

1986 has ceased to be perceived as sufficient to justify this governmental action, which has disappeared since then.

In spite of radical changes, the details of which we cannot discuss at present, it remains that the administration still possesses considerable power (whether it is local or national) which permits it, always in the name of the general interest, to lay constraints upon private interests in very different areas.

From the earlier period, a heritage persists that plays a very important part. The importance attributed to the general interest, and hence its primacy, has actually assumed such proportions that it has led to the creation of a specific law—administrative law—and a specific judge charged to enforce it. Both the administrative law (3.1) and the administrative judge (3.2) have gone through fine and not always perceptible mutations, which have substantially modified the perception and the treatment of the general interest.

3.1. The mutation of the administrative law

After the Revolution, as is commonly known, ordinary judges were forbidden to interfere with the acts of public actors. The pursuit, or at least the assumed pursuit of the general interest, was protected in the most radical way possible, while contesting it was absolutely not allowed.

At the same time, the body secreted its anti-body. The Council of State was progressively led to exercise an increasing control upon the administration and its use of the exorbitant powers exercised by it and granted to it.

This single mechanism created administrative law, and then enriched it with successive strata. It also explains why this law was chiefly and above all a jurisprudential law: it was the Council of State that defined its own methods of handling cases, and defined the general principle to which the action of the administration was subordinated.

During several decades, the extreme subtlety of the law that was expanding on all sides led the professors charged with analysing and commenting on it to the edge of ecstasy, while it led the miserable students condemned to try to understand it to the edge of suicide.

Some dissident voices were trying to explain that the concern of the Council of State to protect citizens against an arbitrary invocation of the general interest was perhaps not so present as was pretended to be,[28] and that the authors of the administrative law did not merit the laurels with which they were crowned.

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28 For example, MESTRE, A.: *Le Conseil d'Etat, protecteur des prérogatives de l'administration*, Thèse, LGDJ, Paris, 1974.

But these voices were not sufficient to endanger a well-rooted prestige. The result was that the change did not happen on this front.

The change came, not that one would ever have thought it, from the fact that the administration ceased to be above all jurisprudential.

While decentralisation divided the competency of the administration among the different levels, at the same time it was necessary to specify the powers of each and their conditions of exercise. The same phenomenon repeated itself whenever the state had to give ground in whatever area: where earlier the administration had a power of decision which could be defined very summarily, the disappearance of this power led to the creation of clear rules that could be substituted for them. Finally, even though the ascendency of the general interest assumed by public persons remained more or less unchanged, in order to render it more tolerable the legislator frequently specified the creating conditions to which all were to adhere.

This was communicated by the impressive multiplication of texts, which have, from that time, framed the activity of the administrative power. Since these texts have to meet the requirements raised by the Constitutional Council, they must be more and more precise.

Since that time, the invocation of the general interest does not suffice to legitimate any decision as far as jurisprudential principles of administrative law are concerned. This invocation must strictly meet the requirements, conditions, forms and procedures of what the law prescribed, frequently in a detailed manner.

Consequently, the part of the administration in the pursuit of the general interest, which is defined and specified outside it, is nothing more than residual, executive in the proper sense of the term. It no longer attracts the comprehension or the indulgence of the administrative judge. It must scrupulously respect administrative law, more and more of legislative origin.[29]

If it is true that the legislator occasionally takes little notice of even the most legitimate private interests, political responsibility leads him not to torture them excessively, which either leads him to define the effects of the general interest or to establish guarantees, both of which lead to the weakening of his power.

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29 To these is added an administrative law arising from public property, taking into account as well the number and the importance of applicable European norms.

3.2. The evolution of administrative justice

Certainly, developments in administrative law have not been without consequences in administrative justice.

First of all, the *Conseil d'Etat* no longer hinders a legal development which in essence operates beyond its control.[30] It is rather telling that of those 119 cases selected in the most recent edition of the famous volume *Grands arrets de la jurisprudence administrative francaise*[31] more than a hundred cases are over thirty years old and only a dozen or less were issued in the last twenty years.

Still, for our purposes, the most important development is that although the *Conseil d'Etat* has not revoked the doctrine under which it reviews administrative acts for their legality but not for their reasonableness, since the end of the 1960's the *Conseil* has taken a much more realistic approach towards administrative decisions based on public interest considerations.

In its first major decision in 1971—which is remarkable in the light of its previous practice—the *Conseil d'Etat* affirmed for the first time that "an action can lawfully be declared to be for a *public purpose* only if the infringement of private property, financial consequences and eventual social inconveniences resulting from the action do not exceed the interest which the action intends to serve".[32] The doctrine thus created is referred to as the "cost/benefit test".

Besides the significance of this doctrine on its own,[33] the development marked, above all, a change in attitudes, and its effects have been felt ever since.

The bitterness of objections, especially economic, and the growing opposition of those who consider public interest a mistake (being the persistence of selfishness),[34] gave a great number of occasions to administrative judges at all levels to appear much less cautious than before. The importance of an action,

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30 The decisions of subordinated form, that of the administrative tribunals, and since 1989, of the six administrative courts of appeal will not be discussed here.

31 LONG, M.—WEIL, P.—BRAIBANT, G.—DEVOLVE, P.—GENEVOIS, B.: *Les grands arrets de la jurisprudence administrative francaise*, Paris, 1966.

32 Conseil d'Etat, Assemblée, May 28, 1971. "Ville nouvelle Est", Rec. 409.

33 Even the authors of the *Grands arrets* admit that the annullations declared on this basis were "relatively few ... (and) ... most often challenged operations of limited significance". *Op. cit.*, 657.

34 One faces here the French counterpart of phrases born in Britain, such as NIMBY (Not In My Back Yard) or in the US, as BANANA (Build Absolutely Nothing, Anywhere, Near Anybody).

even if considerable sums have already been spent, is not a challenge any more. Without hesitation administrative judges declare annulments, the consequences of which would have been avoided a few years ago.

In doing so, in order to ascertain the appropriateness of an action, to weigh its importance, and to approve of its effects, administrative judges apply all means available to trace the real consideration of public interest behind the standard references made by the administration.

All this is not to say that the public interest is not needed anymore. What it shows simply, yet importantly, is that a new balance has been struck between public interest and private interest. Claiming the mere existence of a public interest does not suffice anymore. Its legislative origin must be shown and also it must be proven that every administrative action is based on it; furthermore, it must be demonstrated that the hardships that may occur are proportionate to the aims to be achieved. In addition, it must also be established that all formal, procedural and substantial requirements which apply to the actions of public figures have been observed.

On the one hand, one may be satisfied with this development because it substantially reduces the chances of arbitrary decisions. On the other hand, one may also consider an unexpected occurrence: attacked from all directions, contested and weakened, by tomorrow the notion of public interest might look much more disturbed than disturbing. Those who have always found this notion a counterfeit may be glad. Others, however, might suggest organizing a conference entitled "Is the disappearance of the public interest in the interest of the citizen?".

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Responsibility Sharing in Public Policy Who Defines the Public Interest in the Cooperative State?

I. Introduction: safeguarding the public interest as a solemn undertaking of the state

According to the legal tradition and political thinking in Germany it is the obligation of the state to safeguard the public interest: it is the state—and only the state—which is obliged and at the same time authorized to formulate and to implement the public interest. Non-governmental actors may contribute to the well-being of the state but they remain in the sphere of society and are attending their private interests. This dichotomy of state and society, of public and private interests, of public law and private law, of administrative courts and civil courts, of state actors and private actors still characterizes German legal thinking and the education and training of legal profession. To understand this principal difference of public and private, it is helpful to look at §§ 74 and 75 of the "Einleitung zum Allgemeinen Landrecht für die Preussischen Staaten von 1794".

§ 74. Rights and benefits of individual members of the state take second place to the common good if a conflict of interest happens.

§ 75. It is the obligation of the state to make compensation to all individuals who have been forced to sacrifice their rights and benefits to the common good.

This is the traditional understanding of the state as the "born" guarantor of the public interest in a world of individuals or organizations pursuing their own (i. e., private) interests.

Today we are observing the process of blurring borderlines between state and society, the public and the private sector[1] and even of public and private law;[2] we are observing furthermore a process of overlapping of state and society. This process finds its expression in hybrid organizations as halfway houses between the public and private sector, in various forms and patterns of public-private partnerships and in networks of public and private actors.

In the sixties and seventies this overlapping and crossing over of the public and private sectors was discussed in terms of corporatism and neocorporatism.[3] To describe these close, nearly symbiotic relations between state administration and organized interests, the successful concept of "Private Interest Government" (PIG) was created, referring to the modern state as aligning itself with powerful corporate actors and giving up its right to exercise guidance and control in respect to society and the economy. Meanwhile the perspective changed and the discussion moved from neo-corporatism to topics like "retreat of the state"[4] or "slimming of the state",[5] focusing the interest less on control-pessimism than on using the self-regulating powers of the third and private sectors to join forces in defining and implementing the public interest in a cooperative manner. Such a deliberate retreat of the state—to quote another catchword—"from providing to enabling" gives the whole discussion a quite different direction: instead of mourning the abdication of the state we have to look for a conception of "bringing the state back in" as an actor with a specific institutional competence and legitimization in defining the public interest in communication with either private actors or ones belonging to the third sector.

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1 SCHUPPERT, G. F.: "Zur Anatomie und Analyse des Dritten Sektors." In: *Die Verwaltung*, 1995, 137–200.

2 Hoffmann-Riem, W.–Schmidt-Assmann, E. (eds.): *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen*, Baden-Baden, 1996.

3 SCHMITTER, Ph. C.–STREECK, W.: "Community, Market, State—and Association?" In: the same (eds.), *Private Interest Government–Beyond Market and State*, London, 1985.

4 SCHUPPERT, G. F.: "Rückzug des Staates? Zur Rolle des Staates zwischen Legitimationskrise und politischer Neubestimmung." In: *Die öffentliche Verwaltung*, 1995, 761–770.

5 Sachverständigenrat *"Schlanker Staat"*, Abschlussbericht, Bonn, 1998.

II. Key concepts in redrawing the boundary between the public and private sectors and in redistributing the responsibility for the public interest

If the state is no longer the one and only actor involved in the process of defining and implementing the public interest, we need a conception defining the proper role of the different actors in the process of putting the common good in concrete terms. It is a typical German approach to choose first the perspective of the state and to ask how "its" special contribution to the shaping of the public interest should be characterized. If the state—in one way or another—has to share its authority in defining the common good with someone else—individuals or corporate actors—we need concepts which tell us something about the division of authority to determine the public interest. Again it might be a typical German approach to translate this "division of labor" as *division of responsibility* because the state's authority to define the public interest can only be understood as its genuine responsibility. This responsibility is—for constitutional reasons—not at its disposal, but there may be different grades of responsibility to express a different intensity of the state's own part in carrying out public purposes. What this paper does is it takes a closer look at conceptions of such responsibility sharing in public policy.

A. Key concept no. 1: Gradings of administrative responsibility

The *conception of responsibility grading* measures the intensity of the involvement of state bureaucracy in implementing public policies[6] or—to put it in economic terms—it defines the administrative performance standards in carrying out public purposes.[7] To determine this *allocation of responsibilities* the concepts is shown below.[8]

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6 SCHMIDT-ASSMANN, E.: "Zur Reform des Allgemeinen Verwaltungsrechts — Reformbedarf und Reformansätze." In: W. Hoffmann-Riem—E. Schmidt-Assmann—G. F. Schuppert (eds.): *Reform des Allgemeinen Verwaltungsrechts*. Grundfragen, Baden-Baden, 1993, 11 ff.; HOFFMANN-RIEM, W.: "Tendenzen in der Verwaltungsrechtsentwicklung." In: *Die öffentliche Verwaltung*, 1997, 433 ff.; SCHUPPERT, G. F.: "Die Erfüllung öffentlicher Aufgaben durch die öffentliche Hand, private Anbieter und Organisationen des Dritten Sektors." In: J. Ipsen (ed.): *Privatisierung öffentlicher Aufgaben*. 1994.

7 NASCHOLD, F. et al.: *Leistungstiefe im öffentlichen Sektor. Erfahrungen, Konzepte, Methoden*. Berlin, 1996.

8 HOFFMANN-RIEM: *op. cit.*

Gradings of responsibility, performance standards:

- performance responsibility
- guarantee responsibility
  - supervisory responsibility
  - regulatory responsibility
- standby responsibility.

These concepts can easily be explained: performance responsibility stands for the direct responsibility of the state to perform certain functions using the state bureaucracy and state personnel (civil servants); examples are police, tax-collecting or exercising jurisdiction. Guarantee responsibility stands for the responsibility of the state to guarantee that public purposes are carried out not necessarily by authorities of state administration but instead by or in cooperation with non-state actors like business firms, interest groups or organizations belonging to the third sector. In case of performance of public functions by private actors, guarantee responsibility shows up as the responsibility to supervise and to regulate these activities: the best example of this is the correlation between privatization and regulation which is typical for the modern regulatory state. Standby responsibility normally sits on the "reserve bench" but comes into action when performance by the private actors turns out to be unsatisfactory; at this moment the state comes back in.

Another conception of allocation of responsibilities is a *model of different phases* in putting the public interest into effect[9] as the table below shows.

Phases of public interest relation:

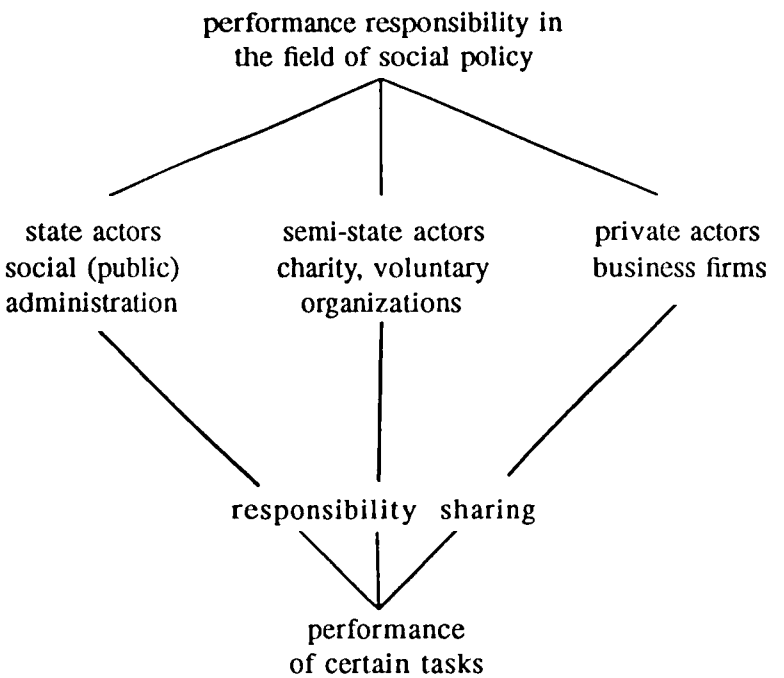
- standard-setting responsibility
- preparatory responsibility
- procedural responsibility
- implementation responsibility
- control responsibility
- realization responsibility
- result responsibility.

9 VOSSKUHLE, A.: "Gesetzgeberische Regelungsstrategien der Verantwortungsteilung zwischen öffentlichem und privatem Sektor." In: G. F. Schuppert (ed.): *Jenseits von Privatisierung und "schlankem Staat": Verantwortungsteilung als Schlüsselbegriff eines sich verändernden Verhältnisses von öffentlichem und privatem Sektor,* Baden-Baden, 1998 (to be published).

Both conceptions described are state-centered conceptions defining different types and grades of state responsibility in the process of the development and implementation of public policies. We will now move to a model of responsibility sharing including different actors playing different roles in public policy.

B. Key concept no. 2: Responsibility sharing

If we want to analyze the division of labor and the cooperation between the public and private sectors in implementing public policies we need an actor-specific perspective which helps us determine the proper role of the different actors in a certain field of public policy. Taking the example of social policy we can describe the model of responsibility sharing as follows:



This conception of responsibility sharing promises to be a very successful conception because it reacts to some popular findings which can be called the "increase of the workload of the state", "decrease of the problem solving capacity of the state", "decline of guidance and control by law" and—last but not least—"retreat of the state". In the discussion about the consequences of these

findings, the concept of responsibility sharing functions as an *interdisciplinary composite concept*[10] which connects different disciplinary discourses, a function which can be judged as an advantage but—at the same time—as a danger (in regard to its lack of dogmatic substance).

The very heart of this conception is the allocation of roles and functions of state, semi-state and private actors in the concert of suppliers of public services. The conception of responsibility sharing is an actor-specific conception defining and analyzing the contribution of different actors in defining and implementing the public interest. Its starting point is the intense discussion about instruments and methods of steering *(Steuerung)*: responsibility sharing means stimulating the special abilities of certain actors—their knowledge, their skills, their organization—to put into effect the common good, not in the way of legal obligation but by using their own specific points of reference and rationalities guiding their organizational behavior.

The problem of this conception is putting into effect this type of "job-sharing" by *developing structures* which enable a responsible cooperation of different actors. This is a central function of the legal order: *to provide organizational and legal structures* as a framework for cooperative actions (see below).

C. Key concept no. 3: Dual responsibility structures

If we look at our legal order we can find many examples of responsibility sharing which give us an idea of possible organizational structures and instruments of responsibility sharing. I only want to give two examples for dual responsibility structures: environment audit and waste collection. In both cases we can study a subtle mechanism: in order to avoid state regulation and supervision by state bureaucracy, private actors build up an organization for waste collecting and disposal which is called *"Duales System"*;[11] in the case of the Öko-Audit[12] the private actors make (voluntary) use of an audit system

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10 TRUTE, H.-H.: "Verantwortungsteilung als Schlüsselbegriff eines sich Verhältnisses von öffentlichem und privatem Sektor." 1998. In: G. F. Schuppert (ed.): *Zur notwendigen Neubestimmung der Staatsaufsicht,* 1998.

11 SCHMIDT-PREUSS, M.: "Duale Entsorgungs-Systeme als Spiegelbild dualer Verantwortung: Von der Verpackungsverordnung zum Kreislaufwirtschaftsgesetz." 1998. In: Schuppert (ed.): *Zur notwendigen Neubestimmung der Staatsaufsicht. op. cit.*

12 SCHNEIDER, J.-P.: "Kooperative Verwaltungsverfahren". In: *Verwaltungs-Archiv,* 1996, 38 ff.

provided by law consisting of a network of independent environmental experts who are nominated by a special organization financed and substantially influenced by the private economy.

I do not want to go into details. But the examples show that organizational structures that combine the guarantee responsibility of the state and the self-regulating forces of private actors already exist. It is necessary to rethink and redefine the traditional legal instruments: the most striking example is the traditional conception of state supervision *(Staatsaufsicht)* which will be a key concept in responsibility sharing.[13]

III. Functions of the legal order to enable responsibility sharing in public policy

A. The availability function of law

Taking an example from the field of public administration, it is the task of the legal order (in this case, the administrative law) to provide a framework for action for the administrative authorities. The administrative law has to provide appropriate procedures for the public administration, appropriate organizational structures, and appropriate instruments and modes of acting in order to enable the administrative authorities to act both lawfully and efficiently. This function of the legal order can be called the availability function of law (*Bereitstellungsfunktion des Rechts*, see Schuppert[14]).

If we apply this enabling function to the problem discussed in this paper, it would be the function of administrative law to enable the state bureaucracy to act in a cooperative spectrum between public and private implementations of public policies. If we talk about responsibility sharing in public policy, the administrative authorities must have the capacity to practice responsibility sharing; i.e., they must have available appropriate organizational arrangements and structures (e.g., for public private partnerships) and an appropriate legal framework such as appropriate types of treaties and agreements. The German legal order and its administrative law are still focused on a public administration exercising sovereign tasks by issuing administrative acts and is not prepared to

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13 SCHUPPERT: *Zur notwendigen Neubestimmung der Staatsaufsicht. op. cit.*

14 SCHUPPERT: "Verwaltungswissenschaft als Steuerungswissenschaft. Zur Steuerung des Verwaltungshandelns durch Verwaltungsrecht." In: *Reform des Allgemeinen Verwaltungsrechts. op. cit.*

provide the means and instruments for the public administration which are useful and necessary in a cooperative state.

B. The necessity of an administrative cooperation law

The task of an administrative cooperation law would be to translate the administrative responsibility for the common good into structures of a co-operation law which provides a framework for the cooperative action of state, semi-state and private actors. The legal structuring of responsibility sharing in public policy by an administrative cooperation law would require structuring achievements in the following respects:[15]

1. Guaranteeing quality standards
To practice responsibility sharing the public authorities need cooperation partners of a certain nature and quality. Taking the example of a possible cooperation between state police and private security firms, it must be ensured that the personnel of the private security firms meet the requirements of a state governed by the principle of rule of law. Cooperation law therefore has to guarantee quality standards of actors involved in the implementation of sensitive public policies.

2. Providing cooperative administrative procedures
An important aspect of responsibility sharing is the availability of administrative procedures to guarantee the procedural responsibility of the state and the appropriate treatment of the different interests involved simultaneously.[16] An interesting example can be found in the field of town planning and development such as the so-called project and site development plans which try to link the interests of the private investor with the procedural responsibility of the municipality in a construction of agreement, public law treaty and municipal ordinance.

3. Providing institutional arrangements as a framework for cooperative action
Another important aspect of responsibility sharing is the development of appropriate institutional arrangements for cooperation and partnership of the public and the private sectors. This not only means providing an organizational

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15 BAUER, H.: "Zur notwendigen Entwicklung eines Verwaltungskooperationsrechts." In G. F. Schuppert (ed.): *Jenseits von Privatisierung und "Schlankem Staat"..., op. cit.*
16 SCHNEIDER: "Kooperative Verwaltungsverfahren", *op. cit.* 38 ff.

framework for cooperative action like the different patterns of public-private-partnership and the mushrooming of hybrid and symbiotic organizational arrangements,[17] but also refers to the systematic rise of organizational law as an instrument of guidance and control.[18] An interesting example is the use of environmental protection enterprises for the improvement of the environment.[19]

4. Development of appropriate forms and patterns of administrative action
The last aspect of responsibility sharing mentioned in this paper is the urgent development of a more subtle repertoire of forms of administrative action suitable for administrative behavior in cooperative surroundings. To give an example: according to §§ 54 ff. of the administrative procedural law (VwVfG), the public law treaty has been designed as an alternative to the administrative act and authorizes administrative authorities to act by treaty instead of issuing an administrative act; what is lacking is the availability of different types of public law treaties, like cooperation treaties, as instruments of contact management or of regulatory treaties to implement the regulatory responsibility of the state as a consequence of large scale privatization.

Responsibility sharing needs legal and organizational structures. It will be the task and function of the science of public administration and public law to provide those structures and to ensure that among a variety of interests the public interest should have an appropriate place.

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17 ENGELHARDT, G.: "'Symbiotische Arrangements' und die Versorgungs-organisation öffentlicher Aufgabenerfüllung." In: J. Kruse—O. G. Mayer (eds.): *Festschrift Katzenbach,* 1996, Baden-Baden, 283 ff.

18 G. F. Schmidt-Assmann—W. Hoffmann-Riem (eds.): *Verwaltungsorganisationsrecht als Steuerungsresource,* Baden-Baden, 1997.

19 FELDHAUS, G.: "Umweltschutzsichernde Betriebsorganisation." In: *Neue Verwaltungsrechts-Zeitschrift,* 1991, 927 ff.

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Regulation and the Public Interest

A Third Way?

When the British Prime Minister, Tony Blair, returned from Washington in February 1998, he spoke of his ambition to create an international consensus of the centre-left for the 21st century around what he called the "Third Way", a new political strategy which differs both from the "Old Left" and from the "New Right". However, he was not the first to claim that he had found a Third Way—President Bill Clinton made a similar claim in his most recent State of the Union address.

Although Blair's announcement initially met with a frosty reception, particularly from those who regard Clinton's policies as largely irrelevant in a European context, support for his analysis, including support from some prominent figures on the left, e.g., the British Foreign Secretary Robin Cook,[1] appears to be growing. In a recent interview,[2] Tony Blair developed his theme that European social democratic parties have a lot in common with the Democratic Party in the US, arguing that they are not only tackling the same problems (economic and social change, globalisation, family disintegration,

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1 RICHARDS, S.: "Why is the Left's Voice in the Cabinet Signing Up to Blair's Third Way?", *New Statesman*, 1 May 1998, 22–23.

2 KETTLE, M.: "Why we can make a Difference", *The Guardian*, 15 May 1998, 4.

community breakdown and social exclusion) but also coming up with many of the same solutions. These solutions represent a new synthesis between the politics of the Old Left, characterised in terms of state control with everything run from the centre, and the politics of the New Right, characterised in terms of *laissez faire* with everything left to markets. However, they should be located on the centre-left of the political spectrum in that they embrace the values of the left, i.e., social justice, solidarity, community, democracy and liberty, but attempt to recast and reshape them to fit the changed circumstances which are encountered in the world today.

In a very insightful analysis,[3] A. Giddens contrasted the Third Way with social democracy (the Old Left) and neo-liberalism (the New Right) on five dimensions: political values, the economy, government, the nation, and the welfare state. The comparisons are set out schematically in *Table 1* below:

Table 1

Comparisons between the "Old Left", the "New Right" and the "Third Way"

The Old Left (social democracy)	*The New Right (neo-liberalism)*	*The Third Way (centre-left)*
class politics of the left	class politics of the right	modernising movement of the centre
old mixed economy	market fundamentalism	new mixed economy
corporatism: state dominates over civil society	minimal state	new democratic state
internationalism	conservative nation	cosmopolitan nation
strong welfare state, protecting population "from the cradle to the grave"	welfare safety net	social investment state

3 GIDDENS, A.: "After the Left's Paralysis", *New Statesman*, 1 May 1998, 18–21.

Political values

While social democracy was explicitly a class politics of the left, Giddens argues that neo-liberalism was, in effect, a class politics of the right. However, as he points out, with the rapid shrinkage of the working class, the salience of class politics and the traditional polarity between left and right has diminished. This change has been taken on board by the Labour Party in Britain and by social democratic parties elsewhere—whereas "Old Labour" saw itself as the party of the working class, "New Labour" (the name given to the revamped Labour Party) seeks to appeal to a much wider constituency for support. Although New Labour rejects the old authoritarianism of the left, it equally rejects the libertarianism of the right, arguing that individual freedom depends on collective resources and entails social justice and that government is essential for its realisation.

The economy

Although, at first sight, it might appear that there is only "one way", in that privatisation and de-regulation are the order of the day and are being pursued around the world, this is not the case. Giddens associates the Old Left with the mix of state-owned industries (often, as in early post-war Britain, representing the "commanding heights" of the economy) and a highly regulated private sector, and the New Right with its advocacy of "free markets", referring to the former as the "old mixed economy" and to the latter as "market fundamentalism". By contrast, the "new mixed economy" associated with the Third Way refers to the balance between regulation and de-regulation (since de-regulation in one economic sector often transfers the need for regulation to another) and between the economic and the non-economic in the life of society (since economic development is always to be judged in terms of its wider social consequences).

Government

While social democrats have, historically, been keen to expand the scope of government and state and neo-liberals have been equally keen to contract them, the Third Way that argues what is necessary is to reconstruct them, i.e. to go beyond those who say that "government is the problem" or that "government is the answer", in order to define and create a new, democratic state. Such a state would be based on the devolution of power, downwards to localities and regions and upwards to transnational agencies. This involves what Giddens calls the "democratising of democracy", which combines achieving greater transparency

in public affairs, experimenting with non-orthodox forms of democratic participation, and aiming for a more fruitful partnership between government and the institutions of civil society.

The nation

Social democrats have traditionally had little sympathy with nationalism, regarding it as a threat to international solidarity. Neo-liberals, on the other hand, have often mixed an assertive and isolationist nationalism with their advocacy of free markets. According to Giddens, the Third Way adopts a different stance here too by attempting to find a new role for the nation in a cosmopolitan world. Due to cross-cutting ties with other transnational bodies, state borders have become softer and more permeable. Whereas nations in the past were, in part, propelled to statehood through antagonism to others, the Third Way holds that nation is no longer coterminous with state.

The welfare state

While social democrats regard a fully developed welfare system as the corner-stone of a decent and humane society, neo-liberals regard it as the enemy of enterprise and the prime source of the decay of civil society. The former want the state to maintain and develop its welfare role while the latter wish to reduce the role of the state to the provision of a safety net. By contrast, the Third Way offers a very different scenario. It argues that the welfare state is in need of reform, not in order to cut it back but, rather, to modernise it and make it relevant to contemporary society. According to Giddens, the new welfare state will be a "social investment state" which establishes a new relationship between, on the one hand, risk and security and, on the other, individual and collective responsibility. The hallmark of the new welfare state will be "wherever possible, invest in human capital rather than the direct payment of benefits" or "provide a hand-up rather than a hand-out".

A critique of Giddens

Giddens' characterisation of the Third Way has been described[4] as "political fudge" and lampooned as high-sounding rhetoric which seeks to legitimate a

4 Wainwright in: GIDDENS, A.—WAINWRIGHT, H.: "Is there such a Thing as a Third Way in Politics?", *The Guardian* (Saturday Section), 23 May 1998, 2.

rather shabby political reality. It has also been criticised[5] for getting its categories wrong, i.e., for confusing social democracy with democratic socialism, and for failing to recognise that Thatcherite governments in Britain introduced a great deal of regulation into the economy in tandem with the privatisation of what were formerly known as "public utilities", i.e., electricity, gas, telephones, water, etc. While the first point is largely semantic, the second is well taken. Gamble's[6] (1988) characterisation of the Thatcherite project in terms of its attempt to combine "the free economy and the strong state"[7] captured its essence although it is important to distinguish its New Right political ideology from pragmatic politics.[8] Regulation was embraced not so much as a virtue but as a political necessity intended to smooth the pursuit of privatisation and increase its legitimacy. More significantly perhaps, the Third Way itself has been criticised for lacking a distinctive economics[9] and for failing to address such central questions as how a modern market economy should be owned and organised. My aim in the remainder of this article is to respond to both these criticisms by considering the central role played by regulation in the Third Way.

Regulation

By regulation is meant the control of behaviour through the setting and enforcing of standards. Although powerful institutions, e.g., the professions and the press, may be entrusted with a degree of self-control and left to regulate themselves,[10] regulation is normally, as Giddens points out, the province of government because, ultimately, only government possesses the sanctioning mechanism of law.

Regulation is typically entrusted to public authorities which are independent of, but report to, the relevant minister (for examples drawn from the UK, see

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5 LAPPING, B.: "Get your Categories Right", *New Statesman* (letter), 15 May 1998, 36.

6 GAMBLE, A.: *The Free Economy and the Strong State: the Politics of Thatcherism*, Basingstoke, Macmillan, 1988.

7 *Ibid.*

8 PARRY, R.: "Social Policy". In: Henry Drucker, Patrick Dunleavy, Andrew Gamble and Gillian Peele (eds.) *Developments in British Politics 2*, Basingstoke, Macmillan, 1986.

9 LEADBEATER, Ch.: "A Hole at the Heart of the Third Way", *New Statesman*, 8 May 1998, 32–33.

10 GRAHAM, C.: "Self-Regulation". In: Genevra Richardson and Hazel Genn (eds.) *Administrative Law and Government Action*, Oxford, 1994, 189–209.

Baldwin and McCrudden[11] and Bishop, Kay and Mayer.[12] The general mandate of these regulatory agencies (which is what these public authorities are collectively called) and the standards they are expected to enforce are typically set out in enabling legislation, but they are often granted extensive rule-making powers and given considerable discretion in enforcing the statutory standards. Thus, unlike the criminal justice system, where offenders can expect to be prosecuted if they are apprehended, prosecutions by regulatory agencies are relatively uncommon.

Comparative and historical perspectives

There is, of course, nothing parochial and, likewise, nothing new about regulation. Modern governments have sought to achieve their economic and social objectives either by regulating the private sector or by establishing a rival public sector or by a mixture of both strategies. In general, regulation has tended to be more important and pervasive in countries like the United States of America where the public sector is small. But, even in countries like the United Kingdom, which developed a large public sector, regulation has also played an important role. In the field of social welfare, regulations, setting minimum standards for housing, controlling rents and establishing security of tenure for tenants, obliging employers to pay minimum wages, establishing standards for health and safety at work, and mandating the provision of occupational welfare, took shape during the nineteenth century and the first part of the twentieth century.[13] In some cases, e.g. rent control, enforcement has been left to ordinary people. For a rent to be registered, a tenant or landlord must take the initiative and apply to the regulatory agency; otherwise the rent will be what the parties have agreed. However, people may not know about their legal rights or about the roles of agencies charged with their implementation, or may lack the confidence or contacts to initiate and carry through a complaint. For these reasons, agencies which rely solely on complaints are usually rather ineffective; effective regulation requires agencies to take the initiative and to engage in the systematic detection of wrongdoing. But the reality is that regulatory agencies tend not to invoke the formal processes of law in many cases where breaches are found. This is due, in part, to the legal form of

11 BALDWIN, R.–McCRUDDEN, Ch. (eds.): *Regulation and Public Law*, London, 1987.
12 BISHOP, M.–KAY, J.–MAYER, C. (eds.): *The Regulatory Challenge*, Oxford, 1994.
13 CRANSTON, R.: *Legal Foundations of the Welfare State*, London, 1985.

regulation and the tradition in which legislation is drafted and, in part, to a chronic under-funding of regulatory agencies. The courts have held that regulatory agencies have a considerable discretion which should be exercised in the light of public policy.

Patterns of regulatory enforcement

According to Kagan and Scholtz,[14] there are three widely held "theories" of non-compliance with regulatory standards. Those who violate the regulations may be viewed as "amoral calculators" who carefully and accurately assess opportunities and risks, as bodies that disobey the law when the anticipated penalty and the chance of getting caught are small in relation to the benefits of non-compliance. In this case, non-compliance stems from economic calculation. Alternatively, they may be seen as "political citizens" who normally comply with the law (partly because they think this is right, partly from self-interest) although their compliance is contingent on the law being seen as reasonable. Where the regulations are regarded as arbitrary or unreasonable, non-compliance may be due to principled disagreement. Finally, they may be regarded as "organisationally incompetent". In this case, non-compliance may be due to organisational failure, e.g., failure to oversee subordinates properly, calculate risks intelligently, publicise the regulations, etc.

Each of these theories is associated with a different regulatory enforcement strategy. If the non-compliant organisation is thought to be an amoral calculator, the regulatory agency's goal should be deterrence and the agency should act like a policeman. If non-compliance is attributed to the principled objections of a political citizen, the goal should be persuasion and the agency should act more like a politician. If it is regarded as being due to incompetence, the goal should be education and the agency should act more like a consultant.

The three "theories" of non-compliance and their associated enforcement strategies are summarised in *Table 2*.

14 KAGAN, R. A.—SCHOLTZ, J. T.: "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies", *Jahrbuch für Rechtssoziologie und Rechtstheorie*, 7, 1980, 352–377.

Table 2

"Theories" of Corporate Non-compliance

Image of Organisation	*Amoral Calculator*	*Citizen*	*Incompetent*
Reason for non-compliance	Benefits of non-compliance exceed costs of punishment	Reasoned disagreement with the law	Organisational failure
Key variable	Incentives	Attitudes	Capabilities
Implicit image of regulator	Policeman	Politician	Consultant
Enforcement strategies	Strict enforcement of rules, increased sanctions	Flexible enforcement of rules, increased pressure to comply	Organisational change, appoint staff responsible for compliance
Problems in applying strategy	Regulatory unreasonableness, legalistic delays	Organisational capture, equal treatment problems	Organisational capture, intervention may make matters worse

Source: derived from Kagan and Scholtz[15]

Among the problems associated with the different enforcement strategies, Bardach and Kagan[16] define "regulatory unreasonableness" in terms of the mismatch between uniform rules and diverse circumstances, arguing that it results from the imposition of uniform requirements in circumstances where they do not make sense, due in part to the failure of regulatory agencies to consider arguments from regulated organisations that exceptions should be made. "Organisational capture", on the other hand, refers to the failure of regulatory agencies to act independently and to their sympathy with the explanations for non-compliance put forward by

15 *Op. cit.* 356, Table II.

16 BARDACH, E.—KAGAN, R.: *Going by the Book: the Problem of Regulatory Unreasonableness*, Philadelphia, 1982.

regulated organisations. It is, of course, particularly prevalent where the agency's staff are recruited from the organisations regulated by the agency.

Bardach and Kagan point out that fear of organisational capture leads to regulatory agencies adopting a "tougher" and more inflexible stance towards non-compliance but argue that this, in due course, leads to an increase in regulatory unreasonableness. They advocate a more flexible approach to regulation in which regulatory agencies and their staff have more discretion. However, the dangers with this approach are that they may offend against the principle of equal treatment and that it is open to abuse. However, by the increased use of output based performance indicators could avoid some of these problems.

Strict vs. flexible enforcement

Although one theory of non-compliance may be the dominant theory in any regulatory agency, discretion enables regulatory officials to make case by case judgements regarding the motives behind non-compliance. The main reasons why such a small proportion (typically much less than 1%) of regulatory offences result in prosecution are that:

- regulatory agencies tend to see their task as one of securing compliance with regulatory standards—they tend to be pro-active rather than re-active and emphasise the promotion of "good" behaviour rather than the sanctioning of "bad" behaviour, they are reformative rather than punitive and forward-looking rather than backward-looking;
- the agency's dominant theory usually views non-compliance as being due to principled disagreement or organisational failure and, where officials have discretion, they tend to see non-compliance in this way too; and
- most regulatory agencies have very few resources and are not in a position to carry out large numbers of prosecutions, even if they want to do so.

Some people regard the small number of prosecutions for regulatory offences as a problem, arguing that regulatory offences should be prosecuted in the same way as other criminal offences and that the failure to do so is indicative of double standards. Others regard it as a virtue and, while accepting the point about double standards, argue that fewer criminal offences should be prosecuted and advocate large-scale diversion of routine criminal cases away from the courts. Thus, while some argue that regulatory enforcement should be more like criminal prosecution, others argue that criminal prosecution should be more like regulatory enforcement.

Regulation and the Third Way

While this is not the place to debate the strengths and weaknesses of these opposing arguments, it is relevant to point out that those who favour the strict enforcement of the law frequently fail to recognise and/or value what is distinctive about regulation. This contrasts with advocates of the Third Way who attach great importance to regulation. According to Giddens[17] regulation is needed for a variety of reasons:

- to preserve economic competition when it is threatened by monopoly—regulated competition is seen as a pre-requisite for the development of the "free" market;
- to control natural monopolies—some industries work more efficiently as monopolies and regulation is clearly needed in such circumstances;
- to create and sustain the institutional bases of markets—contrary to neo-liberal orthodoxy, markets do not spontaneously produce order and this may require a degree of regulation;
- to remove public, political or cultural goods, e.g., professional commitment, altruistic service, community feeling and moral obligation, from the unwanted intrusion of the market place;
- to harness markets to medium and long-term goals and to prevent short-term gains from preventing the achievement of long-term benefits, e.g., clean drinking water, road safety and uncontaminated food;
- to flatten out market fluctuations on a macro or micro level;
- to protect the physical and contractual conditions of workers; and
- to react to and cope with catastrophes, including catastrophes induced by the market.

Most, albeit not all, of the aims listed above refer to the regulation of the economy and those that do not are rather limited in scope. A broader set of justifications which more explicitly embraces the use of regulation to promote social welfare might also include the following:

- to control the strong and protect the weak;
- to promote the welfare of the community as a whole; and
- to enhance the public interest.

17 GIDDENS: *op. cit.*

The public interest

The "public interest" is a good example of a contested concept.[18] Thus, it is almost always the case that a number of competing conceptions of what constitutes the "public interest", each of which may be "coherent, plausible and attractive",[19] will coexist with each other. However, this does not mean that the concept is devoid of meaning or that it is merely a rhetorical device which is invoked to confer legitimacy on whatever the person using the concept favours.

According to Brian Barry,[20] "the public interest" refers to "those interests which people have in common as members of the public". Thus, it can be distinguished from individual interests (interests which members of the public have as individuals) and common interests (interests which two or more people have in common). He suggests[21] that there are two kinds of instances in which the concept is used. While negative applications of what is said to be in the public interest involve preventing someone from doing something, for example polluting the atmosphere, which will have adverse effects on "the public", positive applications of what is said to be in the public interest involve providing something, such as parks or roads, for the public.

Giving priority to the public interest

Barry's justification for making a special principle out of the public interest involves three steps. He argues that

- the government acts as a trustee for its citizens—although a long line of political philosophers (including Locke and Burke) have endorsed this view, it is important to note that there is a tension between trusteeship and democracy;
- the duty of a trustee is to look after his or her client's interests—assuming, that is, that the trustee knows what his client's interests are; and it follows that
- the duty of the government is to look after the interests of all its citizens, i.e., to do things which are "in the public interest". This would be straight-

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18 GALLIE, W. B.: "Essentially Contested Concepts." In: *Philosophy and Historical Understanding*, London, 1964.

19 MASHAW, J. L.: *Bureaucratic Justice*, London and New Haven, 1983.

20 BARRY, B.: *Political Argument*, London, 1965.

21 *Ibid.* 208.

forward if the interests of the public coincided but is clearly more problematic when, as is almost always the case, they conflict.

The question of what to do when the interests of members of the public conflict is a complex one. Utilitarians argue that "the public interest" is obtained by summing up all the interests involved. Bentham, as is well known, described "the public interest" in this way. However, Barry is uncomfortable with this approach, arguing that governments should concern themselves with and give priority to the pursuit of common or shared interests over individual and personal interests. His justification for so doing is that unless governments do so, these interests will be squeezed out. Thus, he argues, governments should pay particular attention to promoting the public interest and the importance that advocates of the Third Way attach to regulation needs to be understood in this light.

Pursuing the public interest through regulation

There are undoubtedly problems with the strategy outlined above. One task which confronts government is that, in specifying the public interest, care is taken to ensure that it is expressed in the rules and standards which regulatory agencies are empowered to enforce as clearly and unambiguously as possible.[22] Regulatory officials undoubtedly need some discretion but, in the interests of procedural fairness, this needs to be "confined, structured and checked"[23] and, as far as possible, officials should not be left to determine what they think constitutes the public interest for themselves. Public officials are not necessarily imbued with different virtues from their counterparts who work within the private sector—they are neither more nor less to be trusted but, like their private sector colleagues, can be enjoined, through training and the existence of appropriate incentives, to do a good job and perform to the best of their ability. Thus, two further tasks which confront government are those of organisational design and staff training, of ensuring that jobs are designed and staff trained in such a way as to ensure that organisational aims are met. While success will undoubtedly enhance the public interest and engender support for the Third Way, failure will have potentially disastrous consequences and significantly reduce its prospects.

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22 BALDWIN, R.: "Governing with Rules: the Developing Agenda." In: Genevra Richardson—Hazel Genn (eds.): *Administrative Law and Government Action*, Oxford, 1994, 157–188.

23 DAVIS, K. C.: *Discretionary Justice: a Preliminary Inquiry*, Chicago, 1971.

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Federal Constitutional Court: Human Rights' Protection Approach and Public Interest

I. Introduction

In present-day Russia the problem of the correlation of public and personal interest is of particular significance since the country, while getting over incredible difficulties of an objective and sometimes subjective nature, is nevertheless, moving along the path of democratization. This is manifested both in the establishment of completely new state institutions (division of powers, constitutional review, alternative elections, multi-party system, etc.) and in injecting a practical content into institutes which had existed before but did not work (for example, the realization of constitutionally guaranteed human and civil rights). The latter were secured in the Constitution but could not be realized because of the impossibility of direct application of the Constitution's rules. Thus, there was a legislative barrier which blocked the fulfilment of some rights and freedoms. Moreover, even if there were no such barrier, the existing state regime would not have allowed such rights and freedoms to be fully realized as they contradicted the political arrangements upon which the regime had been based.

Rights, freedoms and their realization are an extremely important indicator of the development of a civil society and its ability to withstand the usurping tendencies of state power. Undivided (or ineffectively divided) state power is inclined to trample over individual interest to please public interest, justifying this with various specious excuses.

The present Russian Constitution, while having absorbed much from the positive experience of Western democracies, constitutions and generally accepted principles and rules of international law in the sphere of human and civil rights, secures a rather extensive array of individual, political, social, economic and cultural rights and freedoms.[1] It should be noted in particular that for the first time both the Constitution itself and rights and freedoms fixed in it are proclaimed to have direct effect.[2] This means that the Constitution becomes in reality a working juridical document with a duty to realize the protection of rights and freedoms.

In this paper an attempt is made to analyze rights "and freedoms" protection by means of the courts. Moreover, in this case it is not a matter of a court of general jurisdiction which settles cases using existing legislation, but of the Constitutional Court, which must ensure the utmost legal protection since in settling cases it uses the Fundamental Law, which has superior legal force. The choice of this profile for considering the correlation of public interest and the interest of the citizen is not accidental. The point is that an individual personifying a personal interest applies in the first place to the court when his rights, freedoms and legitimate interests are violated, the court being the state body (we speak about the rule-of-law state or the state trying to become such). This is paradoxical if a public interest is considered to oppose a personal one: the state body must abide by the state interest. However, in this case the court is set up by society specifically for the protection of its members' interests. The Constitutional Court remains separate from other juridical bodies since its tasks are specific. It does not try criminal, civil or other cases on their merits.

II. Russian Constitutional Justice: the first experience

The Constitutional Court it is not a court of cassation or appeal with regard to general jurisdiction courts. As a body of constitutional review, the Constitutional Court, in our opinion, deals with a larger-scale task, namely, checking the constitutionality of statutory acts adopted in this country. It is this process that gives individuals more chance for their interests to be protected because the Constitutional Court's work results in reducing both the number of unconsti-

1 Russian Federation Constitution ch. 2, translated in *Constitutions of the Countries of the World* (Albert P. Blaustein—Gisbert H. Flanz eds.), 1994 [hereinafter Russian Const.].

2 Russian Const. Art. 18.

tutional acts and, therefore, potential possibilities for violations of human and civil rights and freedoms.

The formation of the Constitutional Court in October 1991 meant a radical change not only for judicial protection but also for the whole state machinery of Russia. On the one hand, the judicial system was being supplemented with a specialized constitutional controlling body, and on the other hand, all judicial power was penetrating the machinery of power, which produced an important counterbalance for the legislative and executive powers. According to the Constitution which existed at that time and the Law on the Constitutional Court adopted on 12 July 1992,[3] the Constitutional Court was proclaimed to be the highest judicial body of power dealing with protection of the constitutional system and was given full powers. In particular, the Court realized its judicial power by means of trying cases on the constitutionality of international treaties and statutory acts (laws, presidential decrees, governmental regulations, etc.), the activity of political parties and other public associations, law enforcement practice, settling disputes about competence among different state bodies and giving conclusions in cases prescribed by law.

During the period from 1992 to 1993 the Constitutional Court examined a number of cases on citizens' complaints and found unconstitutional the following actions: dismissal from office on the basis of age, which qualifies as discrimination; establishment of limits for lodging a complaint against unlawful dismissal; imposition of discriminatory penalties upon the workers of the prosecutor's offices; eviction from unlawfully occupied accommodation by a prosecutor's sanction and no right of lodging a complaint against the sanction, which is considered a restriction of the right to judicial and other protection; and restrictions on compensation by a specified time of payment when reinstating a person unlawfully dismissed. The Constitutional Court confirmed the equality principle in contractual relations between the state and a citizen. It acknowledged the constitutionality of citizens' demands for the state to discharge its obligations concerning special-purpose cheques for the purchase of cars and indexation of citizens' incomes and savings. The Constitutional Court's attitude towards the protection of Russian citizens' political freedom and right to associate, and of freedom of speech, media and referendum may also be considered a merit.

Considering cases on individual complaints of Russian citizens, foreigners and stateless persons, the Constitutional Court found unconstitutional the law

3 Congress of People Deputies and the Supreme Soviet of the RSFSR Report. 1991. No. 19. Art. 621; No. 30. Art. 1016, 1017.

enforcement practice but not the corresponding provisions of law or other statutory acts. The latter could only be repealed by the bodies which had passed them. This order caused considerable trouble for the work of the Constitutional Court. For example, the Constitutional Court's decision of 27 January 1993,[4] found unconstitutional the law enforcement practice of a time restriction on payment for forced absence from work when a person is unlawfully dismissed. This practice was based on provisions of part 2, Art. 213 of the Code of Labour of the Russian Federation. However, in the ruling of 15 June 1995, the Constitutional Court had to acknowledge that courts should, as usual, confine themselves to collecting compensation for one year as envisaged by the given rule, because the Russian Parliament had not correspondingly amended the labour legislation.

When describing the first stage of constitutional control development in the Russian Federation, it should be noted that mistakes and extremes, which may be partly explained by "growing pains", could not be avoided. Constitutional control may well have a long tradition in the Western democracies, but it is practically a new concept for Russia, not taking into account a short working experience of the USSR Committee on Constitutional Supervision.[5] The Constitutional Court was at the centre of the conflict between legislative and executive powers and failed to take an independent and impartial stand. It was drawn into the political confrontation and solved questions of both law and fact. A number of judges did not agree with the Court's position as a whole and refused to participate in its work until the new Parliament of the Russian Federation—the Federal Assembly—had started to function. In this situation, any decision reached by the incomplete staff of the Court would not be valid, which is why on 5 October 1993 the Constitutional Court resigned its duties to check the constitutionality of statutory acts and international treaties. The Constitutional Court's activity (with a new staff) resumed only after the Constitution of the Russian Federation and Federal Constitutional Law on the Constitutional Court of 24 June 1994[6] were passed.

4 Russian Federation Constitutional Court Review. 1993. No. 2–3.

5 The first specialized body of constitutional supervision was the USSR Committee on Constitutional Supervision, founded in April 1990 according to the Law "On Constitutional Supervision in the USSR". (See Congress of People Deputies and the Supreme Soviet of the USSR Report. 1988. No. 49. Art. 727.)

6 Russian Federation Legislation Collection. 1994. No. 13. Art. 1447.

III. Constitutional Court as a tool of human rights' protection

With the beginning of the Constitutional Court's activity according to the new Federal Constitutional Law, the number of cases connected with human and civil rights' protection considerably increased. The broadening of the Court's possibilities in this sphere (from the assessment of law enforcement practice constitutionality to the assessment of law) serves as an additional guarantee of fundamental human and civil rights and freedoms.

It should be noted that the Court asserts rights and freedoms of the citizens not only in cases of direct complaints and inquiries of courts as part 4, Art. 125 of the Constitution envisages, but also in cases connected with verification of the constitutionality of acts and treaties. For example, the Court's ruling of 18 January 1996,[7] in the case of verifying the constitutionality of an article of the Altai Region Charter, found unconstitutional that article of the Charter which had envisaged the election of the executive power by a body of representatives. This article was acknowledged to violate civil electoral rights. In its ruling of 4 April 1996,[8] in the case of verifying the constitutionality of a number of the Russian Federation constituents' acts which regulate citizens' registration, the Court declared violations of the civil right to freedom of movement and choice of residence. The Court has drawn attention to the violation of this right when trying the "Chechen case".[9] It should be noted that in all the above decisions, not citizens but state bodies applied to the Court. Thus, the Court tries cases fully and multifariously not only when analyzing the essence of the disputed provisions from the point of view of their constitutionality, but also revealing possible violations or restrictions of fundamental rights and freedoms.

Cases on civil rights' and freedoms' protection examined by the Constitutional Court can be divided into the following groups: cases connected with verifying the constitutionality of criminal and criminal procedure legislation rules; with verifying the constitutionality of administrative legislation which limits the rights of private property; with verifying the rules of electoral legislation; cases considering complaints against violations of labour and social rights and freedoms; and cases concerning the restriction of the civil right to residence. The Court also has examined cases concerning issues of inheritance, Russian citizenship and the legal status of stateless people.

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7 Russian Federation Constitutional Court Review. 1996. No. 1.

8 Russian Federation Constitutional Court Review. 1996. No. 2.

9 The Constitutional Court Ruling on the "Chechen case" was adopted on 31 July 1995. (See Russian Federation Constitutional Court Review. 1995. No. 5.)

A. Constitutional review of criminal and criminal procedure legislation rules

The Court ruled on the constitutionality of the criminal procedure legislation provisions guaranteeing the civil right of relief (provisions of 3 May and 13 November 1995,[10] 2 February and 13 June 1996,[11] etc.) and found unconstitutional a number of provisions of the Code of Criminal Procedure. Thus, in the case of the complaints of K. M. Kulnev, V. S. Laluyev, Yu. V. Lukashov and I. P. Serebrennikov, the possibility of a review process in the exercise of supervisory powers was analyzed and the decisions rendered by the highest judicial supervisory authority—the Presidium of the Supreme Court of the Russian Federation. In its ruling of 2 February 1996,[12] the Court concluded that the Code of Criminal Procedure provisions establishing the final judicial supervisory powers are constitutional only when restrictions envisaged by them do not exclude the possibility of other procedural remedies for the correction of judicial error. In particular, the Court considered the possibility of Russian citizens' application to the interstate bodies on human rights' and freedoms' protection as well as the possibility of repeated consideration by means of the procedure for reopening a case. In view of this, the Code of Criminal Procedure provision restricting grounds for reopening a case was found unconstitutional.

The case examined by the Constitutional Court against the complaint of V. V. Shchelukhin[13] is of interest from the point of view of both civil rights' protection and procedural issues of the Court's activity. In its judgement, the Court found unconstitutional the Code of Criminal Procedure provision envisaging suspension of investigation and custody terms during the period allowed for the accused to study his case materials. At the same time, the ruling points out that the above provision "loses its force on the expiry of 6 months" from the moment the ruling has been proclaimed. Thus, the Court applied a procedure of postponing the execution of a judgement. Justice N. V. Vitruk, having voiced his dissent, believes that the Court's ruling in this part contradicts the general principles of constitutional law and the Law on the Constitutional Court, in which, according to Art. 79, sec. 3, "acts or separate provisions found unconstitutional lose their force". That is, in the justice's opinion, the Court, having once found the rule to be unconstitutional, has no right to acknowledge

10 Russian Federation Constitutional Court Review. 1995. No. 2–3, 6.

11 *Id.* No. 6.

12 *Id.*

13 The Constitutional Court ruling on 13 June 1996. (See Russian Federation Constitutional Court Review. 1996. No. 4.)

its operation within a further period of six months. However, the Court does not exceed the limits of the Law, because Art. 79, sec. 3 does not determine definite terms of the losing of force of acts or their separate provisions found unconstitutional. Besides, Art. 80 of the Law envisages the Court's right to establish independently the terms of execution of a judgement.

Citizen V. A. Smirnov's case is of interest because it distinctly reveals contradictions between public interest and the interest of the citizen. On the one hand is the state's desire to secure itself and its interests, yet on the other hand, there are human rights guaranteed by the Constitution. In the case under consideration the claimant contested the Criminal Code's provision envisaging responsibility for treason in the form of betraying state or military secrets to a foreign state in conducting hostile actions. The Court in its ruling of 20 December 1995[14] considered constitutional those Criminal Code provisions that mediate a betrayal of a state or military secret to a foreign state as well as rendering assistance to it in conducting hostile actions against Russia. The provisions about escaping abroad and refusal to return from abroad were found to be unconstitutional, because the Constitution guarantees the right to leave the country and to return freely. Besides, such actions cannot encroach upon the state's defence, sovereignty, territorial integrity, security and defence capacity.

Issues connected with the possible institution of criminal proceedings against judges by the Qualification Collegium of Judges were tried by the Court on the basis of complaints by R. I. Mukhametshin and A. I. Barbash. In the Court's ruling of 7 May 1996,[15] it said that the corresponding Law on the Status of Judges cannot be interpreted as excluding the possibility of appeal against the Qualification Collegium of Judges' decision, because a legislatively established and complicated order of institution of criminal proceedings against a judge is a matter of procedural machinery and not of a personal privilege of a citizen holding the office of a judge. Therefore, the refusal of the Judges' Collegium to institute criminal proceedings with regard to a judge "is not an insuperable obstacle". First, this decision may be appealed in the Superior Qualification Collegium of Judges of the Russian Federation. Secondly, it may be appealed in court according to the Law On Appeal Against Actions and Decisions Violating Citizens' Rights and Freedoms,[16] as such a decision affects the rights of both the judge himself and the citizen who suffered from his actions.

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14 Russian Federation Constitutional Court Review. 1995. No. 6.

15 Russian Federation Constitutional Court Review. 1996. No. 2.

16 Congress of People Deputies and the Supreme Soviet of the RSFSR Report. 1993. No. 19. Art. 685; Russian Federation Legislation Collection. 1995. No. 51. Art. 4970.

The Court inexorably stood for the constitutionally guaranteed rights and freedoms and, therefore, for the prevalence of the interest of the citizen to the detriment of the public interest. This was also demonstrated in the case of verifying the constitutionality of the provisions of the Russian Federation Law On State Secrets, a case tried in connection with a number of citizens' complaints. The problem was that the court of general jurisdiction refused to allow participalis in the trial by an attorney at law who had no access to state secret data. In its judgement of 27 March 1996,[17] the Court ruled that dismissal of attorneys from participation in a trial did not conform to the Constitution of the Russian Federation and its provisions of the right of every person to receive qualified legal assistance and the right to counsel at every stage of a criminal proceeding as well as to the principle of competitiveness and equality in judicial proceedings.

In its ruling of 13 November 1995,[18] the Court found unconstitutional Art. 209, sec. 5 of the Code of Criminal Procedure which limits the possibility of appeal against the ruling of dismissal of a criminal case. The above rule of the Code of Criminal Procedure was mentioned by the Court in its ruling of a year later on 28 October 1996,[19] in a case of verifying the constitutionality of Art. 6 of the Code of Criminal Procedure with regard to citizen O. V. Sushkov's complaint. The latter asked the Court to find the above article unconstitutional, because, in his opinion, it "violated the constitutional principle of presumption of innocence and did not entitle the accused to object against the dismissal of a case and to demand to try it on its merits". Having noted that the criminal procedure legislation does not contain a direct prohibition against the dismissal of a criminal case to be appealed, because the ruling of 13 November 1995 had removed the obstacle which existed at the given moment, the Court found Art. 6 of the Code of Criminal Procedure to be constitutional, because "the dismissal of a criminal case resulting from a change of circumstances does not mean establishing the guilt of a person in the crime committed, does not prevent him from the realization of his right to defence, and supposed receiving his agreement to dismiss the criminal case on the stated basis".

In its ruling of 28 November 1996,[20] the Constitutional Court again studied the constitutionality of provisions of the Code of Criminal Procedure. This time the Court examined the case of verifying the constitutionality of Art. 418 of the

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17 Supra note 15.

18 Russian Federation Constitutional Court Review. 1995. No. 6.

19 *Id.* 1996. No. 5.

20 *Id.*

Code concerning an inquiry of the Karatuzsky district court of Krasnoyarsk region. This court considered unlawful the combining of such court functions as institution of criminal proceedings, statement of a charge and administration of justice of the same case. The given article of the Code of Criminal Procedure regulates criminal proceedings of cases in which pre-trial preparation is exercised in the form of a record, i.e., when an inquest body collects materials confirming the commission of a crime without having instituted criminal proceedings, and draws up a record about circumstances of a crime and directs it to a court with the prosecutor's sanction. The latter, in accordance with Art. 418 of the Code of Criminal Procedure, makes a decision on the institution of criminal proceedings where he states the charge identifying a definite article of criminal law according to which the accused is liable, and then, in accordance with Art. 419 of the Code of Criminal procedure, solves the case. Having thoroughly studied the essence of the question, the Constitutional Court concluded that the Code's provisions "empowering a judge to institute criminal proceedings on the basis of the materials prepared in record form or to refuse the institution", as well as envisaging "the judge's duty to state a charge in the decision of institution of criminal proceedings" are unconstitutional. The reasoning behind this stand, the Court pointed out, is that administering justice is the exclusive power of the judiciary and the court cannot perform any functions which are not in accordance with its position as a body of justice. Performance of these powers in initiating the prosecution and maintaining the prosecution before the court must be the charge of special agencies, i.e. pre-trial bodies of inquest, pre-trial investigation, and the prosecutor's office. "The court must examine the results of their activity, objectively and impartially deciding questions of lawfulness and grounds for bringing an accusation, as well as considering complaints against actions and decisions of officials exercising judicial proceedings at pre-trial stages. As has already been noted, the ruling found unconstitutional the provision imposing upon a court the function of stating a charge. The Constitutional Court considers that for the judge who has instituted criminal proceedings and stated a charge in respect to a definite person, an objective analysis and legal assessment of the case is made difficult because acquittal or other judgement in favour of the accused may be perceived as evidence of his erroneous previous judgement." Thus, the following constitutional principles are violated: independent judicial control for securing rights of citizens in criminal judicial proceedings, and exercising judicial proceedings on the basis of competitiveness as well as the human right of consideration of a case by an independent and impartial court. The ruling says that "a judge, having received a record and other accompanying materials

concerning the crime and having recognized them sufficient, has a right and obligation to make a decision solely about the sitting of a court solving only those questions which are to be solved in such acts in accordance with the general rules of the Code of Criminal Procedure".

The contradiction between public interest and the interest of the citizens was distinctly revealed in one more decision where the Constitutional Court analyzed provisions of the Code of Criminal Procedure. This was the ruling of 28 January 1997,[21] in a case of verifying the constitutionality of Art. 47, sec. 4 in connection with a number of citizens' complaints. The latter applied to the Court with individual complaints against violation of their constitutional rights under the above provision of the Code according to which only attorneys at law and representatives of trade unions and other public associations are admitted as defence lawyers in criminal trials. It should be noted that the case was examined by the Chamber of the Constitutional Court[22] and the decision was made by five votes to four. In the Court's ruling it is noted that the constitutional "right to choose an attorney (defence counsel) independently does not mean choosing any person in the capacity of an attorney at the defendant's discretion and does not suppose participation in the criminal procedure of any person in the capacity of an attorney". The Court noted the given right to be one of the manifestations of a more general right, the right to qualified legal assistance. The state guarantees this right and, therefore, has a right to establish statutorily the corresponding conditions of these or those persons' admittance to render such services. Therefore, the provision of the challenged article of the Code of Criminal Procedure envisaging admittance of an attorney in the capacity of a defence counsel when a warrant of a legal advice office is presented, was found constitutional. Of interest is the Court's reasoning concerning the possibility of admittance to defence of a trade union representative or other public association only when a corresponding record or identification card is presented. The judgement draws attention to the fact that the law does not require such a representative to have legal training, professional competence or experience. In the Court's opinion, it "makes doubtful the possibility of ensuring the defendant the right to receive qualified legal aid". At the same time the Court had no right to consider the constitutionality of this provision of the Code because this question had not been put the claimants.

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21 Russian Federation Constitutional Court Review. 1997. No. 1.

22 The Federal Constitutional Court consists of two chambers, which include 10 and 9 justices respectively.

In our opinion, this case illustrates public interest prevailing over personal because the Court did not answer the question of the lawfulness of striking from a defence counsels' list persons other than attorneys and representatives of public associations, even if those persons had a license for rendering paid legal services. Four dissents were stated in this case. Justice V. O. Lutchin considers that Art. 47, sec. 4 of the Code of Criminal Procedure does not define the criteria of professionalism of legal assistance rendered to defendant: "this article says nothing about a defence lawyer's legal qualification or competence, only his membership of either the Bar association or a public association is pointed out". The justice comes to the conclusion that the above provision of the Code has to be found unconstitutional because, in the sense attached to it by law enforcement practice, it restricts the suspects' and defendants' right to qualified legal assistance rendered by persons who are not members of the Bar association. In V. O. Lutchin's opinion, "there are no grounds not to admit, in the capacity of defence lawyers, persons with licences for rendering paid legal services and officially, on behalf of the state, confirming their compulsory legal training".

A similar point of view is expressed by the judges E. M. Ametistov, V. I. Oleinik and N. T. Vedernikov. In their dissents they point to the difference between the terms "attorney" and "defence counsel" used in the text of the Constitution. The word "attorney" is narrower in the sphere of its application because it only refers to the activity of professional lawyers. The term "defence counsel" is wider because it refers to the activity of any person engaged in defence or representation of somebody's interests in courts and judicial proceedings. Besides, E. M. Ametistov appeals to the materials of the Constitutional Conference and proves that the authors of the Constitution intended to establish and ensure the right of persons taken into custody and charged with committing a crime to an independent and very wide choice of defence counsels, including lawyers who practise privately and who are not members of the Bar associations. All of these justices agree on a contradiction in Art. 47, sec. 4 of the Code of Criminal Procedure in that part which prevents the admittance, in the capacity of defence counsels, of persons who are not members of the Bar associations.

B. Constitutional protection of the right of private property

On 17 December 1996,[23] the Constitutional Court examined a case on verifying the constitutionality of Art. 11, sec. 1, items 2 and 3 of the Russian

23 Russian Federation Constitutional Court Review. 1996. No. 5.

Federation Law On Federal Agencies of Tax Police. The inquiry was made by promoters and owners of limited liability partnerships and related to the issues of lawfulness of the collection of tax arrears by tax police agencies, as well as to the amount of penalties deducted from legal entities and other sanctions envisaged by legislation. In the claimants' opinion, such collection, violates the right of private property and contradicts Art. 35 of the Constitution of the Russian Federation.[24] The Constitutional Court, having divided all the challenged sanctions into two groups, ruled that the legislation provisions concerning one of these groups, namely, collection from legal entities of tax arrears and fines in the case of late tax payment, does not contradict the Constitution of the Russian Federation. However, those provisions that envisage collection from legal entities of penalties as well as the whole amount of hidden or understated income (profit), incontestably and without their agreement, are unconstitutional. In the first case, the Court examined the issue from the point of view that the right to private property is not absolute, i.e. in accordance with the federal Constitution and a number of rules of international law it may be restricted by federal law under certain circumstances (for example, when it is necessary for the protection of the fundamentals of the constitutional system, morality, health, other persons' rights and lawful interests, securing the country's defence and ensuring the state's security). Further, the Court analyzed the nature of the constitutional duty to pay lawfully established taxes and dues. In the Court's opinion, it is of "a specific, namely, of a public and legal (civil and legal) nature, which is due to the public nature of the state and state power ... Collection of taxes cannot be considered an arbitrary deprivation of the owner's property. This constitutes a lawful taking of a part of the property as a result of a constitutional public duty". Legal tax relations are based on one party's legal subordination to the other; a tax agency's requirement and a taxpayer's duty result not from the contract but from law, and any dispute over failure to fulfil a tax duty is in the framework of public (tax, in the given case) and not civil law. The Constitutional Court especially noted the right to appeal the decisions and actions (inactions) of tax agencies and their officials as envisaged by Art. 46 of the Constitution of the Russian Federation.

In the second case, the Court examined the issue from the point of view that collection of the whole amount of hidden or understated income (profit) and

24 Art. 35 of the Constitution, in particular, fixes such provisions as protection by law of the right of private property; the right to own property, to possess it, to enjoy it and to dispose of it both indnvidually and jointly; the possibility to be deprived of the property only in accordance with the court's judgement. (See Russian Const.)

different penalties is not in the framework of the tax obligation and is not of a restorative nature but of a punitive one, being punishment for tax violation. The Constitutional Court noted that a tax police agency indisputably had the right to reach a decision of collecting penalties from a legal entity when it detected a tax violation. However, a taxpayer, in his turn, has the right to appeal this judgement in court and (or) in a higher tax agency. In this case a penalty cannot be collected incontestably and collection must be postponed until the court has reached a decision concerning the taxpayer's claim. Otherwise, Art. 35, sec. 3 of the Constitution is being violated as, according to it, a person can only be deprived of his property by judgement of a court.

A similar problem (protection of the right to private property) was being analyzed by the Court when it examined the case on verifying the constitutionality of Art. 280 of the Customs Code (ruling of 20 May 1997[25]). This article envisages the customs bodies' right to administratively confiscate goods and transport facilities because of a customs regulations violation. The Novgorod regional court tried the case of citizen A.V. Andreyev to whom the above penalty was applied and who had addressed his inquiry to the Constitutional Court. In this court's opinion, authorizing the customs bodies with this right infringes the right of private property and contradicts Art. 35, sec. 3 of the Constitution according to which "a person can only be deprived of his property by judgement of a court". Having studied the submitted material, the Court concluded that the customs body's ruling on confiscating the property in the form of a sanction for a customs violation did not contradict the requirements of the Constitution, provided that there is a guarantee of subsequent judicial control as the means of protection of the owner's rights.

Justice A. L. Kononov does not agree with the Court's judgement in the case. He considers impermissible the linking of availability or unavailability of a judicial guarantee envisaged by Art. 35, sec. 3 of the Constitution only with the declaration of intention of the person who lodged a complaint. The justice asserts that "otherwise, a person who has not been duly informed about an administrative decision, or has neither opportunity nor wish to lodge a complaint, is automatically deprived of the constitutional guarantees of property protection". Justice Kononov draws attention to the divergency in his opinion, of the Constitutional Court's stand in this case compared with its other Chamber's decision of 17 December 1996,[26] in the case on verifying the constitutionality of the provisions of Art. 11 of the Russian Federation Law On

25 Russian Federation Constitutional Court Review. 1997. No. 4.

26 Supra note 23.

Federal Tax Police Bodies. The justice reminds us that according to the decision reached then, in the case of a taxpayer's disagreement with the administrative collection of payments as well as when a penalty is in the form of civil, administrative and criminal sanctions according to Art. 35, sec. 3 of the federal Constitution, the question may be solved only by means of a trial. As a divergency exists in the positions of the Constitutional Court chambers, the case should, in A. L. Kononov's opinion, be referred to the plenary meeting.

C. Constitutional review of the rules of electoral legislation

In its ruling of 21 June 1996,[27] the Constitutional Court found unconstitutional two provisions of Art. 20 of the Law of the Republic of Bashkortostan[28] On Elections of Deputies to the State Assembly of the Republic of Bashkortostan of 13 October 1994. The first provision stated that as a necessary condition for a candidate to be registered, electors' signatures from the corresponding district totalling not less than 5% of the total number of electors must be collected in his support. Having stressed that regulation of human and civil rights and freedoms (electoral, in the given case) is related by the federal Constitution to the powers of the Federation, and that their protection is related to the joint competence of the Federation and its constituents, the Court referred to the federal Law of 6 December 1994 on Fundamental Guarantees of Electoral Rights of Citizens of the Russian Federation.[29] This Law states that "the maximum amount of signatures necessary to register a candidate cannot exceed 2% of the number of electors of the corresponding electoral district". The second provision of the challenged law of the Republic envisaged the following for the candidate's registration: the obligatory submission by a group of electors to the district electoral commission of the minutes (or extracts from minutes) of a general meeting held by the electors at their places of residence, work or study; submission of a certified, in accordance with established procedure, list of not less than 100 persons having voted for the candidate's nomination, this list containing surnames, names, patronymics, addresses, numbers and series of passports or other identification cards. The federal Law only fixes the necessity to observe the following conditions for the candidate's registration upon his introduction by electoral associations and electors who have nominated the

27 Russian Federation Constitutional Court Review. 1996. No. 4.

28 There are 21 republics in the structure of the Russian Federation. Republic of Bashkortostan is one of them.

29 Russian Federation Legislation Collection. 1994. No. 33. Art. 3406.

candidates: availability of the candidates' applications containing their agreement to ballot in the given electoral district and the necessary amount of electors' signatures in support of the candidate. The Constitutional Court came to the conclusion that the law of the Republic of Bashkortostan had introduced additional requirements restricting the right of citizens and residents of the Republic to elect and to be elected. Besides, the Court has drawn attention to the following: that "having increased the amount of electors' registration as well as having complicated the procedure of their collection, the republican law has put citizens of Bashkortostan in an unequal position with the citizens of other Russian Federation constituents when exercising their electoral rights". According to the federal Constitution the state must guarantee the equality of human and civil rights and freedoms irrespective of the citizens' place of residence.[30]

D. Constitutional protection of labour, housing and other social rights

The following rulings were connected with citizens' labour and social rights: the ruling of 11 March 1996 (on protection of the rights of citizens who suffered exposure to radiation as a result of the Mayak production plant accident in 1957 and the disposal of radioactive waste products in the Tetcha River[31]), the ruling of 23 May 1995 (on protection of the rights of children whose parents underwent political repression and acknowledgement of having been repressed and, not only having suffered from repression, the children who were with their parents in penal institutions, exile, places of deportation and special settlements[32]), the ruling of 16 October 1995 (on protection of the rights of pensioners who were deprived of their pensions owing to suspension of payments for the time when they were in penal institutions[33]), the ruling of 17 May 1995 (on protection of civil aviation workers' right to strike[34]), the ruling of 6 June 1995 (on protection of the rights of Militia officers discharged on the initiative of the corresponding head of the Interior's office, on the basis of expiration of the service period which concedes the right to pension[35]).

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30 Russian Const. Art. 19, sec. 2.

31 Russian Federation Constitutional Court Review. 1996. No. 2.

32 *Id.* 1995. No. 2–3.

33 *Id.* No. 6.

34 Supra note 32.

35 *Id.*

In 1995 the Court examined two cases connected with housing rights of citizens. In its ruling of 25 April 1995,[36] in the case of verifying the constitutionality of Art. 54, sec. 1 and 2 of the Russian Federation Housing Code in connection with L. N. Sitalova's complaint, the Court found unconstitutional the provision on "the established order" as a procedure for moving into an accommodation provided the obligations of the residence permit are observed. The legislator proceeds from the statement that registration, which has replaced the institute of residence permit, or absence of it cannot serve as a ground for restriction or as a condition of realization of civil rights and freedoms, including the right to housing.

The reason for examining the other case was not only citizens' complaints but also the inquiry of the court of general jurisdiction, which came to a conclusion about the contradiction between the norm of the Housing Code and the Constitution. The given norm states that accommodation is kept for the tenant who is temporarily absent and for the members of his family for a period of only 6 months, and then, according to Art. 61 of the Housing Code they may be judicially found to lose the right to this accommodation. In its ruling of 23 June 1995,[37] the Court found unconstitutional those Housing Code provisions which restrict the right to use accommodation because the citizen's temporary absence, including imprisonment, serve as grounds to deprive him of the right to use the accommodation (the claimants were deprived of this right because they had been sentenced to imprisonment).

Dissent was stated in this case. Justice Yu. M. Danilov came to the conclusion that the challenged provisions of the Housing Code did not contradict the Constitution. In his opinion, "losing the right to a certain accommodation does not entail losing the civil right to housing: a citizen may realize this right at any time by means of either concluding a new contract of tenancy (subtenancy) or entering into a civil legal relation. The Housing Code contains the necessary legal mechanisms to prohibit arbitrary deprivation of housing: the grounds on which a citizen may be found to lose his right to accommodation are clearly stated and judicial remedy of rights and lawful civil interests are envisaged (Art. 61)".

The procedure of inheriting the property of collective farm households became a subject of consideration by the Court in a case on verifying the constitutionality of Art. 560, sec. 1 and 2 of the Russian Federation Civil Code

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36 *Id.*

37 Russian Federation Constitutional Court Review. 1995. No. 2–3.

in connection with A. B. Naumov's claim (ruling of 16 January 1996[38]). He was denied the relief demanded in his complaint by the court of general jurisdiction (on acknowledgement of the property right to the part of a house) on the basis of Art. 560, sec. 1 of the Civil Code according to which in the case of a collective farm household member's death there is no inheritance of the household's property. The Court, supposing that the institution of collective farm household has lost its legal grounds both in land legislation and new civil legislation, as well as proceeding from the fact that a special procedure of opening the inheritance in the collective farm household rendered the subjective right of inheritance guaranteed by the Constitution in practical terms unrealizable, found unconstitutional the challenged rule and the rules connected with it.

Justice N. V. Vitruk, having stated his dissent, considers the above rules of the Civil Code to correspond to the Constitution because they "do not disclaim and impair the right of inheritance in the collective farm household, and the restriction connected with a special procedure of realization is stated by law to protect the rights and lawful interests of other collective farm household members". The justice also believes that the Court, having not recognized a collective farm household as the subject of law, goes beyond the framework of its powers as it "virtually undertakes the legislator's function".

E. Constitutional protection of the right of citizenship

On 16 May 1996,[39] the Constitutional Court passed a ruling which supported a man who had gone through all possible judicial levels (of courts of general jurisdiction) and asserted his personal interest, personal right, and right of citizenship in the given case. The case consisted of verifying the constitutionality of Art. 18, item "g" of the federal Law on Citizenship of the Russian Federation in connection with A. B. Smirnov's complaint. The latter was born and lived in the Russian Federation, then for a number of years he lived in Lithuania and returned as a permanent resident to Russia after 6 February 1992.[40] He was denied a supplementary sheet in his USSR passport certifying his Russian citizenship. All courts, including the Supreme Court, denied his claim. The Constitutional Court, having studied the materials of the case, came to the conclusion that the courts of general jurisdiction on the basis

38 *Id.* 1996. No. 1.

39 Russian Federation Constitutional Court Review. 1996. No. 3.

40 The day when the federal Law On Citizenship of the Russian Federation came into force.

of Art. 13, sec. 1 and Art. 18, item "g" of the Law on Citizenship had considered A. B. Smirnov to have lost Russian citizenship. Thus, in the opinion of the bodies of general jurisdiction, he had the right to acquire citizenship only through the procedure of registration. The Court stated that the former USSR citizen's presence outside the Russian Federation at the moment of the Law on Citizenship coming into force could be considered one of the conditions of acquisition of Russian citizenship in the procedure of registration only in respect to those persons who are not considered to be citizens of the Russian Federation by birth. According to Art. 13 of the law, A. B. Smirnov falls into the category of persons "who were born after 30 December 1922[41] and later lost citizenship of the former USSR". Such persons are considered to have been citizens of Russia by birth if they were born on the territory of the Russian Federation. Thus, A. B. Smirnov is a citizen of Russia by birth not only in the past, before having lost USSR's citizenship, but also after it until the moment when he wishes to change his citizenship. In the reasoning part of the ruling, the Court stressed that the category of persons such as A. B. Smirnov did not lose Russian citizenship "only by virtue of the fact of residence outside the Russian Federation at the moment of the law coming into force, because Art. 4 states that residence of a citizen of the Russian Federation outside the country does not terminate Russian citizenship". Therefore, the Court found unconstitutional the challenged provision of the Law on Citizenship. At the same time it agreed with the necessity of the so-called notifying registration of citizens of the Russian Federation who have lived outside Russia; this is to confirm that they have returned to Russian territory for permanent residence, that they have not expressed their wish to terminate their belonging to the Russian citizenship by birth, and also to confirm that they do not hold citizenship of another state which was part of the former USSR. Notifying registration must be of a registering nature and cannot be "a circumstance, on which availability or unavailability, acquisition or discontinuation of citizenship of the Russian Federation depends".

F. Constitutional protection of freedom of movement; right to leave the country; the right to freedom and personal inviolability of the stateless person

Let us consider some recent cases from the Constitutional Court's practice. The judgements passed in these cases, in our opinion, are especially revealing from the point of view of public interest prevailing over the interest of the citizen.

41 The day when the Soviet Union was established.

These cases show how some bureaucratic bodies, which must carry out certain functions, explicitly or implicitly have justified their actions (inactions) by prevailing public interest.

A number of provisions of statutory acts of Moscow, and the Moscow and Stavropol regions making the realization of the constitutional freedom of movement and choice of place of residence dependent on the payment of certain dues were found unconstitutional in that part in which they violated the constitutional principles of equality, and restricted fundamental human and civil rights and freedoms (the ruling of the Constitutional Court of 4 April 1996[42]).

On 15 January 1998,[43] the Constitutional Court examined a case on verifying the constitutionality of Art. 8, sec. 1 and 3 of the federal Law on Procedure of Entry to the Russian Federation and Departure from the Russian Federation. The ground for considering the case was Russian citizen A. Ya. Avanov's claim of violation of his constitutional right to leave Russia freely. Avanov, who had a permanent residence permit according to his place of residence in the city of Tbilisi (the Republic of Georgia—former constituent part of USSR), in fact during many years had been living in Moscow. In 1996 he applied to the Department of Visas and Permits of the Moscow's Main Department of Interior for a foreign passport. The foreign passport was denied because he lacked a place of abode, the availability of which would allow him to be registered in Moscow according to his place of residence. The Tver intermunicipal court (the lower court of general jurisdiction), where A. Ya. Avanov applied, also denied his claim based on Art. 8 of the federal Law on Procedure of Entry to the Russian Federation and Departure from the Russian Federation. The court pointed out that Avanov has a right to apply for a foreign passport only to the authorised bodies according to his place of residence outside the Russian Federation, i.e., in the Republic of Georgia.

In the opinion of the Constitutional Court which delivered its judgement in the above case, constitutional rights and freedoms are guaranteed to citizens irrespective of their place of residence, including the availability or unavailability of their accommodation for permanent or temporary residence, all the more so as the state is not bound by the obligation to provide its citizens with accommodations in every case. Realization of the civil rights to leave the country freely and, correspondingly, to be issued a foreign passport must not depend on the availability or unavailability of the citizen's accommodation. The Court has drawn attention to the fact that the procedure of issuing a foreign

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42 Russian Federation Constitutional Court Review. 1996. No. 2.

43 Russian Newspaper. 29 Jan. 1998.

passport according only to the place of residence is a sign of discrimination which contradicts Art. 19, sec. 1 and 2 of the Constitution, wherein equality of human and civil rights and freedoms are guaranteed irrespective of the citizen's place of residence, and even more so irrespective of the availability or unavailability of registration according to the place of residence. According to Art. 3 of the on federal Law on the Right of Citizens of the Russian Federation to Free Movement, Choice of Place of Residence and Stay within the Borders of the Russian Federation, registration or its unavailability cannot serve as grounds for restriction or a condition of realization of civil rights and freedoms envisaged by the Constitution and laws of the Russian Federation, or constitutions and laws of the republics which are constituents of the Russian Federation.

The Russian Constitution is known to admit the possibility of restricting civil and human rights and freedoms by federal law only to the extent necessary to protect the fundamentals of the constitutional system, morality, health, rights and lawful interests of other persons, the country's defence and the state's security. Certain restrictions are stated in the federal Law on Procedure of Entry to the Russian Federation and Departure from the Russian Federation. It contains an exhaustive list of such cases according to which the right of the citizen of the Russian Federation to leave the country may be temporarily restricted. In particular, restrictions are established for persons with access to information considered a state secret, persons drafted for military service, suspects, convicts, persons avoiding performance of obligations imposed by court and persons who falsely represented information when drawing up papers. However, all these restrictions operate irrespective of the citizen's residence and are not connected with the availability or unavailability of registration. The Constitutional Court found the challenged provisions to be unconstitutional.

In its judgement in the second case of verifying the constitutionality of the provision of Art. 31, sec. 2 of the USSR Law of 24 June 1981 on Legal Status of Foreign Citizens in the USSR, in connection with Yakha Dashti Gafur's complaint, the Constitutional Court found unconstitutional the challenged provision according to which a foreign citizen or a stateless person in respect to whom a decision of deportation from the Russian Federation has been taken, in case of avoiding deportation, can be apprehended, with the prosecutor's sanction, for the amount of time necessary for deportation, without the judgement of a court (ruling of 17 February 1998[44]).

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44 Russian Federation Legislation Collection. 1998. No. 9. Art. 1142.

The essence of this case was the following: Yakha Dashti Gafur, a stateless person, resided in the Russian Federation and was apprehended on 18 February 1997 on the grounds of the ruling of the Department of Visas and Permits of Moscow's Main Department of the Interior, sanctioned by the Prosecutor of Moscow, on his escorted expulsion from the Russian Federation. For more than 2 months he was in custody in the Centre of Social Rehabilitation of Moscow's Main Department of the Interior and on 29 April 1997 was forcibly deported to Sweden. The ruling on Gafur's deportation from Russia was rendered on the basis of Art. 31, sec. 2 of the USSR Law on Legal Status of Foreign Citizens in the USSR, according to which a foreign citizen or a stateless person must leave the country in the period of time stated in the deportation decision; a person avoiding departure, with the prosecutor's sanction, is liable to apprehension and forcible expulsion, apprehension being allowed for the period of time necessary for expulsion to take place. However, the federal Constitution secures the right of every person (including foreign citizens and stateless persons) to freedom and personal inviolability; apprehension and custody being allowed only in accordance with a judgement. Until the judgement has been passed, a person cannot be held in custody for more than 48 hours. Thus, a foreign citizen or a stateless person on the territory of the Russian Federation, in the case of their forcible expulsion from the country, can be held in custody until a judgement is passed for the period of time necessary for expulsion but not in excess of 48 hours. A person may be held in custody in excess of 48 hours only in accordance with a judgement and only under the condition that without such action a decision on deportation cannot be executed. The ruling stresses that "a judgement must guarantee protection for a person not only from arbitrary prolongation of the custody period in excess of 48 hours, but also from unlawful apprehension itself, because a court in any case assesses the lawfulness and grounds of apprehension of every person". Apprehension for an indefinite period of time cannot be considered an admissible restriction of the right to freedom and personal inviolability, but rather, in fact, impairment of the given right. This is why the challenged provision of the USSR Law on apprehension for the period necessary for expulsion must not be considered grounds for apprehension for an indefinite period even when solving the issue of a stateless person and deportation is delayed by virtue of the fact that no state agrees to admit the person being expelled. "Otherwise, apprehension as a necessary measure for executing a decision on deportation could turn into an independent form of punishment, not envisaged by the Russian Federation legislation and contradicting ... the rules of the Constitution of the Russian Federation".

IV. Conclusion

The analysis of the above cases witnesses that the federal Constitutional Court implements rights' and freedoms' protection irrespective of any circumstances which may serve (and, unfortunately, have served, when unlawful decisions were taken by state bodies before judicial involvement) as a justification for impairment of the interest of the citizen in the broadest sense. For example, in the two above-mentioned judgements the Constitutional Court took into account neither the lack of a permanent place of residence nor the lack of Russian citizenship to protect the claimants' rights and, consequently, rights of persons having found themselves in similar situations. Here it is important to emphasize that, in accordance with the Law on the Constitutional Court, if the Court, as a result of examining a case on the constitutionality of laws in claims of violations of constitutional rights and freedoms, finds the law applied in a certain case to be unconstitutional, this case is liable to review by a competent body under common procedure. Besides, the judicial expenses of citizens and their associations are subject to reimbursement in the established order. Serious guarantees of the realization of human and civil rights and freedoms guaranteed in the Constitution are being established.

The Russian Constitution, as was mentioned above, envisaged the possibility of restricting personal rights and freedoms.[45] Thus, the Constitution defines both spheres where rights and freedoms may be restricted and the form of a legal act fixing such restrictions, i.e., federal law. The latter goes through a number of stages before coming into force: adoption of the law by the State Duma, approval by the Federation Council and, finally, signing and promulgation by the President. There are additional guarantees against arbitrary and unjustified restriction of rights and freedoms. Art. 56 of the Constitution envisages the possibility of rights' and freedoms' restriction in a state of emergency. According to this article in a state of emergency certain restrictions of rights and freedoms may be established and their limits and terms are stated. These restrictions are aimed at ensuring the security of citizens and protecting the constitutional system and they are in accordance with federal constitutional law. As can be seen, here the guarantees are increased owing to the introduction of another form of a legal act restricting rights and freedoms. We

45 Art. 55, sec. 3 of the Constitution of the Russian Federation states that such restrictions may take place when it is necessary, with the purpose of protection of the fundamentals, of the constitutional system morality, health, other persons' rights and lawful interests, securing the country's defense and ensuring the state's security.

refer to the federal constitutional law, for which the observance of much stricter conditions are required in order for it to come into force. Art. 56, sec. 3 of the Constitution particularly stresses that under no conditions are the following rights and freedoms liable to restriction: right to life, right to personal dignity, right of privacy, freedom of conscience and religion, freedom of entrepreneurship and other business activities not prohibited by law, the right to housing, and the right to compensation.

Establishing certain limits in the constitutional legislation for restriction of personal rights and freedoms is essential for ensuring their free development and realization with no threat of suppression by the state. However, as can be seen from the foregoing material, public interest still often prevails over the interest of the citizen and this manifests itself both in legislation and executive regulations and in the practice of their application by state and local bodies. In this connection, the activity of the Constitutional Court authorized to verify the constitutionality of statutory acts on the basis of citizens' complaints of violation of their constitutional rights and freedoms is extremely important. This prerogative of the Court and strict compliance with it will undoubtedly help to bring Russian society closer to a democratic and rule-of-law state where a person and his or her rights and freedoms are of the greatest value.

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The Interdependence of Economic and Social Rights

Chapter 1 of the Constitution of the Russian Federation lists the principles of freedom of economic activity (Art. 8) and the social state (Art. 7) among the most important constitutional principles forming the foundations of the constitutional order of the Russian Federation. Economic and social rights rest on the foundation of these constitutional principles. At the same time, tension exists between them in actual constitutional practice, tension which now and then turns into real competition. In order to discover the interdependence between economic and social rights, it is necessary to first explain exactly what kind of rights we are talking about.

1. Economic rights

Chapter 2 of the USSR Constitution of 1977 was entitled "Economic System", and secured the foundations of the economy (all of which had been made the state economy). There is no such chapter in the Russian Constitution of 1993. This does not mean at all that the Constitution is indifferent to the foundations of the economic order. The current Constitution also defines the bases of the economy, but indirectly, that is, through the rights and freedoms of people and citizens.

The constitutional treatment of entrepreneurial activity has thus changed. If prior to this practically all economic spheres were in the hands of the state, now

business and the economy are interpreted through the prism of basic economic rights, since Arts. 34 and 35 of the Constitution, which secure the right to freedom of economic activity and the right to private property, appear in Chapter 2 of the Constitution, "Rights and Liberties of Man and Citizen". Now in the sphere of economics, private enterprise and private property have priority. Therefore, on the constitutional level, the economic sphere is now primarily a sphere of private interests and private initiative; that is, the area of regulation which traditionally used to belong to private law.

The Constitution does not grant a state monopoly to domestic trade, nor does it provide for legal immunity for the state. The "revolutionary" effect of the constitutional principles brings profound change not only in the sphere of economic relations. The effect of these principles on social relations is no less significant. The constitutional principles which form the basis of the constitutional order are systematically connected. Neither the principle of freedom of economic activity nor the principle of the social state are exceptions. The state has abandoned the sphere of economics, it does not conduct entrepreneurial activity in the previous capacity, and the influence of state property is steadily reduced as a result of privatization.

We cannot expect the social state to be capable of taking upon itself full responsibility for providing for all of its citizens' needs. When the socialist state acted in the capacity of a general employer, it actively engaged in the redistribution of public goods by means of the redistribution of the profits obtained by state enterprises. However, the state was not social, because uncontrolled militarization of the economy and low labor production led to a situation in which outlays to the social sphere were realized according to the so-called residual principle (i.e., first outlays for defense, for the space program, and only afterwards for social payments).

The foundations of a social state are currently being created in Russia. In general, these are also redistributive relationships, yet they are fundamentally different from the previous relationships. Now, distribution takes place only through taxation (and not by direct taking of profits). Moreover, taxation is a limitation on the right to private property and thus, according to the Constitution, it must, like other limitations on fundamental rights, submit to general rules—in particular, rules about the proportionality of such limitations. In a decision of 4 April 1996, in the matter of the registration procedure for citizens, the Constitutional Court of the Russian Federation made this clear:

> Taxation always signifies a certain limitation on the right to property, secured in Art. 35 of the Constitution of the Russian Federation. In

connection with this, the provisions of Art. 55.3 of the Constitution of the Russian Federation fully extend to the laws of the subjects of the Russian Federation regarding taxes and fees. That article states that the rights and freedoms of man and citizen may be restricted by federal law only to the extent that this is in accordance with defined constitutionally significant purposes, i.e., proportionally. Taxation, which paralyzes the realization by citizens of their constitutional rights, should be recognized as disproportional. Therefore, considering the excesses of taxes and fees, the problem of their differentiation in connection with the guarantee of the principle of equality and justice acquires special significance.[1]

The constitutional principle of freedom of economic activity is influenced by the norms of Chapter 2 of the Russian Constitution which secures the rights that are characteristic of a society in which a market economy exists. These are such fundamental rights as:

1) The right to choose one's activity or occupation—the freedom to be an owner or an employer (Art. 37).
2) The right to move and to choose one's residence (Art. 27).
3) The right of associations for joint economic activity—the freedom to choose organizational-legal forms of entrepreneurial activity and various entrepreneurial structures (Art. 34).
4) The right to have property in one's ownership; to possess, use, and manage property as individuals as well as in conjunction with other persons, the freedom to possess, use, and manage land and other natural resources—the freedom to own real estate (Arts. 34 and 35) and the freedom to own land (Art. 36.2);
5) The right to freedom of contract—the right to enter into civil-legal and other agreements (Art. 35.2);
6) The right to protection from illegal competition (Art. 34.2);
7) The freedom to engage in any entrepreneurial or other economic activity not prohibited by the law and in accordance with the principle "everything is permitted that is not prohibited by the law" (Art. 34).

We consider as fundamental economic rights those rights which predetermine the foundations of the economic structure. These include the constitutional right to freely use one's abilities and property for entrepreneurial or other economic activity not prohibited by law, the right to private property, the right of citizens

1 *Vestnik Konstitutsionnogo Suda Rossiyskoy Federatsii*, 1996, No. 2, 53.

and their associations to have land in their private ownership and the right to protection from illegal competition.

2. Social rights

The constitutional protection of social rights is dictated by the necessity to guarantee the solidarity of the interests of different members of society. The Preamble to the Constitution of the Russian Federation lists civil peace and accord as one of the goals of society. Also, Art. 13 of the Constitution prohibits the establishment of public associations which incite social strife. The protection in the Constitution of social rights has the goal of securing the solidarity of interests by means of the creation of those circumstances which would secure an adequate life and free development for each person.

The idea of a human right to an adequate existence was developed by the Russian jurist and philosopher Pavel Novgorodtsev at the end of the nineteenth century. His brief article "The right to an adequate human existence" became the most important initiative in the development of this idea in legal science and political theory.[2]

Novgorodtsev argued that the formal right to freedom, proclaimed by western liberalism, should be supplemented by the right to the guarantee of an adequate existence. "The mission and the essence of the right is actually the protection of personal freedom, but for the realization of this goal we must also take care of the material conditions of freedom; without this, for some people freedom remains an empty sound, an unattainable good–provided for them by law, but taken away by reality. Thus, in the name of the protection of freedom the law should take upon itself responsibility for the material conditions of its realization; in the name of the dignity of the individual, the law should take upon itself the responsibility for protection of the right to an adequate human existence." Novgorodtsev formulated this idea, first propounded by the Russian philosopher V. Solov'ev, as a legal problem and first posed it to social liberalism, or neo-liberalism, the political theory which replaced classical liberal individualism in the twentieth century.

Article 39.1 of the Constitution guarantees to everyone social security in old age, in case of disease, invalidity, loss of breadwinner, to raise children, *and in other cases established by law*. This article lists only part of the largest group

2 See NOVGORODTSEV, P. I.: *Sochineniya.* Moscow, 1995, 312–329.

of constitutional rights—social rights. Related to these are also rights such as the guarantee of a minimum wage (Art. 7.2), the right to security against unemployment (Art. 37.3), the right to state protection for motherhood, childhood, and the family (Art. 38.1), the right to state support for fatherhood, invalids, and elderly citizens (Art. 7.2), the right of low-income citizens to receive housing free of charge or for an affordable price (Art. 40.3) and the right to health care and medical assistance (Art. 41), including free medical assistance in state and municipal health institutions (Art. 41). To this list of constitutional social rights we can also add rights which are included in Art. 39.1 of the Constitution under the words "and in other cases established by law".

In the time of Stalinism these rights were denied those who were victims of political repression. In Russian doctrine social rights are considered spheres of refraction of general human values such as equality, social justice, humanism and the moral foundations of society. As a result, the whole intention of social rights in Russia consists not only in the fact that they address the need to provide means of living for elderly and disabled citizens, but also in providing for their restitution. The Constitutional Court of the Russian Federation examined the constitutionality of the 1991 Law on the Rehabilitation of Victims of Political Repression and ruled that the goal of this law, as proclaimed in its preamble, is the rehabilitation of the victims of political repression and the guarantee of compensation (*to the degree possible* in the present time) for material and moral damage. Naturally, restitution is limited: property which was confiscated from persons who were subjected to repression is not returned; instead the persons are paid a relatively small monetary sum.

In the decision on the constitutionality of the Law on the Social Protection of Citizens Exposed to Radiation as a Consequence of the Accident in 1957 at the Industrial Union "Mayak", the Court decided that even the constitutional right to a favorable environment (Art. 42) can be included among social rights: "the guarantee of social protection of citizens as applied to the right to a favorable environment and protection of health may include a complex of advantages and compensations exceeding the limits of compensation for the damage caused to health or property by the ecological offense".[3] The above-mentioned law of 20 May 1993 did not establish criteria for a favorable environment and did not establish responsibility for the compensation. The compensation for damages which were suffered in the accident at "Mayak", in accordance with this law, are fulfilled in a special procedure, without the necessity of proving the damage done by the ecological offense. Consequently,

3 *Vestnik Konstitutsionnogo Suda Rossiyskoy Federatsii*, 1996, No. 2, 28.

the measures provided for in this law, in essence, are measures of social protection and, simultaneously, are restitutive measures. Measures of social protection are connected to the norms of Art. 7 (which declares that the Russian Federation is a social state), and Art. 39 (which guarantees fundamental social rights), but not Art. 42 (the right to a favorable environment), as, in our view, the Constitutional Court mistakenly held.

Such a relationship to social rights in Russia is genetically linked to the ideas of socialism. As a result, we observe a strange spectacle—a state which declared that its goal is the creation of a free market economy using thirty-eight percent of the gross domestic product as state funds. Obviously, the degree of recognition of social rights is not proportional to the level of economic development. Social rights assume a redistributive relationship to society, the creation of a so-called fund for public consumption. The realization of social rights means the prosperity of equalizing social payments, which makes the creation of an investment budget impossible. As a result, the state remains paternalistic. And a paternalistic state is not necessarily the same thing as a legal state. The constitutional right to private property in a paternalistic state is in constant danger of being violated. Every citizen is required to pay the *lawfully established* taxes and fees. But can we consider excessive taxes lawfully established when they are levied for the realization of a wide range of constitutional social rights?

The term social state also implies one in which state power is limited by human rights and in which the established legal order secures general freedom, formal equality and the rule of law. These limitations on the powers of authorities of the state make it impermissible to realize the social-economic rights of one citizen to the detriment of the political, economic and spiritual freedom of other members of society. It is also impermissible for the state to interfere in the regulation of the economy to the detriment of market relationships. Observance of these requirements helps to secure the legal foundations on which a democratic legal state can function as a social state as well.[4]

3. The relationship between economic and social rights

The relationship between the fundamental rights examined above is reminiscent of the physical law of the equal height of fluid in connected containers. In our case, the connected containers are the economic and social policies of the state.

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4 *Kommentariy k Konstitutsii Rossiyskoy Federatsii.* (Ed. Yu. V. Kudryavtseva), Moscow, 1996, 43.

Ulrich K. Preiss called attention to the fact that social (positive) rights differ from negative rights in that for their realization the state has to resort to actions which are the result of political decisions subject to public judgement and evaluated by the criteria of expediency. The courts, of course, are not competent to make these decisions. If social privileges and assistance were simply elements of social and economic policy, directed toward the growth of the purchasing power of the population, then these social benefits, as one of the results of economic and social policies, would be subject to the influence of economic and political cycles and, consequently, to great uncertainty and instability. The transformation of available favorable economic possibilities into *rights* imposes on the government the responsibility not to change in the distant future the already accepted order of allocation. To possess a right, as Preiss correctly observed, means that the interest of the right-bearer is immune from the uncertainties of economic cycles and economic competition.

This theoretical conclusion may reinforce and substantiate the reference in the decision of the Constitutional Court of 1 December 1997 in the case of the constitutionality of a series of articles of the federal law passed in 1995 which modified the 1991 Law on the Social Protection of Citizens Who were Exposed to Radiation as a Result of the Catastrophe at the Chernobyl Nuclear Plant. This decision is noteworthy because, in contrast to the earlier examination of the constitutionality of the law regarding those who suffered in the "Mayak" incident in 1957, the Constitutional Court did not, despite the title of the law, consider the Chernobyl victims' right to payment a social right. The Court came to the conclusion that these payments are the compensation for damages caused by the state. (Article 53 of the Russian Constitution provides that everyone has the right to compensation from the state for damage caused by the unlawful action of state organs or their officials.)

The Constitutional Court ruled that the establishment in the Chernobyl law of the duty of the state to compensate for damages by means of monetary and other compensations and benefits was caused due to the practical impossibility of compensation in the usual judicial order, because the harm was done to hundreds of thousands of citizens. Consequently, regardless of what kind of indemnities are mentioned in the law—privileges, monetary compensations, other kinds of social payments—all of this is compensation on the basis of the principle of maximally possible use by the state of the means it possesses for securing the adequacy of such indemnity. Also, the legislature has the right to change the methods of indemnity and to elaborate the criteria for who is eligible for compensation. However, such a decision should not contradict constitutionally defined goals or diminish or limit the rights of the citizen,

including those established in Art. 42 of the Constitution. From this point of view, the amount of indemnity should be unconditionally observed by the state.

One of the reasons that the Constitutional Court did not regard payment to the Chernobyl victims as social payment was because, despite the fact that the given payment and compensation were of a clearly redistributive character, the goal of this redistribution lies beyond the limits of the idea of a social state. The duty to compensate victims is related to the fulfilment of the idea of a legal state. The Court stated that the basic content of social rights is determined first of all by the so-called political organs of the state—the President, the government, and the parliament—not by the courts.

The uncertainty of the basic content of social rights and their determination by political organs does not mean, in our opinion, that the Constitutional Court should declare its complete neutrality towards the problem of social rights. On the contrary, in many instances constitutional control should be extended to laws in which the economic or social policy of the state is incarnated. The difficulty of the problem of the limits of the participation of constitutional courts in the determination of economic and social policies is explained by the fact that in essence this is a problem of in what measure the judges are competent to force their concepts on the legislature.

The government and parliament, as political organs, have the sovereign right to make a general evaluation of the economic and social situation in the country and work out decisions on a basis conform to the law. The creation of economic or social policies by the legislature signifies the determination of priorities of public interest and the possibilities of combining these with individual rights and freedoms. Consequently, the formulation of the public interest should be fulfilled by the political organs in such a way that it does not cross the boundaries of the constitutional coordinates. The definition of the latter, in many respects, is the prerogative of the Constitutional Court. The problem is that sometimes the Constitutional Court may rather freely interpret constitutional principles; we can ask whether the discretion of the political organs is thereby replaced by the discretion of the court. Moreover, different Constitutional Courts may understand the applications of the Constitution differently. I refer to the possibility that some courts may decide that all of the most important relationships that arise in society are regulated in the Constitution, so that practically any law can be referred back to constitutional norms. Other courts may understand the essence of the Constitution differently, and consequently, be less active.

Article 68 of the Law on the Constitutional Court of the Russian Federation, which addresses the possibility of discontinuing proceedings, lists as a basis

for the ceasing of execution the situation when the question covered by the law is not covered in the Constitution of Russia or, by its nature and importance, is not regarded as a constitutional matter. We can make a statement about the activism of the Constitutional Court and about how it understands the essence of the Constitution on the basis of an analysis and generalization of the application by the courts of the norms analogous with those contained in Art. 68.

It is especially difficult to secure the legitimacy of the interpretation of such constitutional principles as freedom of economic activity, the social state, and the equality of all before the law and the courts. It is appropriate to mention as an example yet one more case examined by the Constitutional Court which called forth a great public response.

In 1997 the Supreme Court of Russia turned to the Constitutional Court with an inquiry about the constitutionality of Art. 855 of the Civil Code which establishes the sequence for writing off funds from the account of a client of a bank in those circumstances when these funds are not sufficient to fulfil the needs of various creditors. The state (to which taxes must be paid), employees (to whom wages must be paid), and commercial banks which have loaned money may all be creditors of the clients of the banks. When many businesses began to systematically withhold wage payments, the Parliament made a change in Art. 855 of the Civil Code, establishing that in case of insufficient funds in the bank account of an organization, it is first necessary to direct funds from the account to wage payments. This change meant that payment of taxes takes place only after all wage commitments are fulfilled.

The inquiry of the Supreme Court raised the question about which constitutional obligation has priority—the constitutional obligation to pay legally established taxes and fees (Art. 57), or the constitutional obligation to pay persons for their labor (Art. 37). The Constitutional Court decided that in case of a crisis of non-payment, an establishment by the legislature of priority for a certain group of citizens, be that employees of commercial organizations or employees of the budget sphere, to whom payments should be made only after complete fulfillment of all preceding requirements without any kind of proportionality, contradicts the principle of equality before the law. An addendum and modification of Art. 855.2 of the Civil Code does not meet the criteria of justice, especially in the current situation when insufficient funds in the accounts of businesses and organizations are not unusual. Crises in the Russian economy and the deficit of financial resources actualized the provision of Art. 855.2, intended for comparatively rare situations that increase the need for legislative regulation of fixed relations.

Outwardly renouncing the priority of obligatory budgetary payments, the legislature defied the logic of the formation of Art. 855.2, creating not only inequality for the realization of rights and legal interests of various groups of citizens, but also competition between constitutional obligations to pay wages and taxes, since it did not precisely determine an order and conditions for the fulfilment of these obligations. The sequence prescribed by this norm may lead to the violation of the constitutional obligation to pay legally established taxes and fees (Art. 57) and form justifications for lawfully avoiding that obligation.

Taxes are the most important source of revenue for the budget, at the expense of which must be secured the observance and protection of the rights and freedoms of the citizen and provisions for the social functions of the state (Arts. 2 and 7 of the Constitution). Without the presence of tax payments in the budget it would be impossible to finance businesses which carry out state orders, institutions of public health and education, the army, law enforcement organs, etc. Consequently, it would also be impossible to pay the wages of the employees of the budgetary sphere.

For this reason, constitutional obligations to pay persons for their labor, on one hand, and to pay lawful taxes and fees, on the other, should not contradict each other. The establishment of a strict priority for one of them signifies the impossibility of the realization, and consequently, the belittling, of the equally-protected rights and legal interests of other groups of citizens, which is not in conformity with Art. 55.2 of the Constitution. According to the estimate of the Ministry of Finance, the effect of Art. 855 of the Civil Code could result in the federal budget not receiving taxes of up to the astronomical sum of fifty billion rubles (approximately 10 billion USD at that time).

The Constitutional Court is an organ which should guarantee the protection of the foundations of the constitutional order and the fundamental rights and freedoms of citizens (Art. 3 of the Law on the Constitutional Court of the Russian Federation). In a hypothetical situation, when Parliament passes laws that shock society, laws which expand the amount of social payments along with the budget deficit, can the Constitutional Court avoid an evaluation of such laws, hiding behind norms that say a court does not decide political questions? Or instead should it decide that a court, all the same, should protect the foundations of the constitutional order, including freedom of economic activity and private property?

There is no simple answer to this question.

In the case regarding Art. 855 of the Civil Code, the Constitutional Court took the risk of becoming absorbed in an evaluation of the economic and social policy, reasoning that the inviolability of property is a very important consti-

tutional value. Since monetary resources which are kept in a bank account are the property of the bank's client, the Court stated that the client should determine for himself whether it is necessary first of all to pay taxes or to pay his employees.

The Constitutional Court, therefore, by means of the evaluation of constitutional laws which embody economic or social policy, becomes an active participant in the determination of the constitutional outlines of this policy. In such cases, the Court should take into consideration the interdependence of economic and social rights—an excessive expansion of the second means an impermissible restriction of the first. The extent of social rights should be in accordance with the possibilities of the state budget. The Constitutional Court, in the process of interpreting the social rights provided for in the Constitution, cannot permit the realization of their deconstitutionalization in practice.

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False Friends and Real Friends in Budget Law

1. Not talking about money

Money makes the world go round; lawyers know this and yet they very often forget about it, or maybe do not want to know about it, or at least prefer not to mention money. If one looks at Western legal opinions on and scholarly coverage of the transformation of the former socialist states, one will notice that all the aspects of the transformation process are covered and that there is, of course, an awareness of the fact that the newly emerged states are poor and that this limits their possibilities; one will even find publications on tax law and projects on taxation systems, but there is practically nothing on the constitutional pattern of budget law and the financing system of the state. So maybe it is true that the judge does not count—*iudex non calculat*—but as far as the legal scholars are concerned, they do not even talk about money. As far as German legal scholars are concerned this is true for the whole profession and not only for the transformation specialists; in fact, there are very few specialists for matters of budget law.

On the other hand, the outcome of the reforms in Central and Eastern Europe will largely depend on how these countries manage their economic and financial difficulties, how they make their national income transparent and thus (hopefully) subject to democratic control, how they (hopefully) redistribute their national income, how they finance those institutions which are meant to protect

the rights of citizens and how they manage to feed those who having nothing to sell on the new market and in the new market economy. We chose the word "outcome" and not the word "success" for the results of the transformation process because it is important to be aware of the obvious fact that of course the national income has been and is being redistributed all the time, ever since the very first days of the transformation process, and that old and new elites are desperately trying to get their big piece out of this cake. In other words, while very important reforms were executed in all domains of law—constitutional, criminal, civil and economic and other branches—that is in those branches of law which seemed to be most important for the transformation from socialism to market economy, the national wealth was continually being distributed and partly redistributed among the old and new elites. It is most significant that the legal framework of this distribution and redistribution, be it on the level of constitutional law or of ordinary law, was and is either completely non-existent—like in the case of the Russian Federation—or exists in a very vague form. The whole problem seems to be a sort of taboo that nobody likes or at least liked to talk about. By "nobody" we mean experts from the Eastern European countries and Western experts alike.

On the other hand, there is a pressing need for "money laws": for good tax laws, for laws on the budgetary process and, in federations, for laws on the distribution of the state income among the center, the subjects of the federation and the municipalities. In many of the Eastern European countries these laws are in the process of being drafted or passed or have been passed recently. The other, non-monetary legal reforms in these countries have been heavily influenced by Western consultants and Western states, or, to put it more cautiously, there have been serious attempts to influence the reform legislation in these fields, of course on the basis of the opinion that the experience of the Western countries is very valuable and worth exporting; it is more than likely that the same will happen or is probably happening in budgetary and tax legislation. So is the Western experience in fiscal legislation a high quality product worth exporting?

We are not going to insist that this is not the case. We are going to explain, though, that Western or at least German fiscal legislation has its oddities, problems and shortcomings and that East European countries would be well advised to at least think twice before adopting certain elements of the German fiscal law. It is not that you cannot explain these things historically or functionally and it is not that you cannot live with them; the question is whether one would adopt such an approach nowadays if one were to regulate the problem for the first time. The legal institutes that we are going to present now

are examples of traditional approaches to certain problems of budget law which cause more and more problems.

2. Taxation and property

In Germany taxes get higher and higher, especially now after the reunification and in view of the limitation on state debts if one wants to meet the Maastricht criteria. So an outside observer may wonder why the constitutional court does not put the brakes on this money-hungry state and its functionaries. The answer is very easy: if there are—practically—no brakes then you cannot put them on. Of course one would presume that excessive taxation somehow infringes upon property and that the classic and well protected constitutional basic right of property will therefore function as a shield against excessive or, to use the German expression, suffocating taxation. This presumption is wrong. The constitutional notion of property in the jurisdiction of the Federal Constitutional Court protects any property right *(vermögenswertes Recht)*, but it does not protect the wealth (the assets) that a given individual calls his own. At least the big taxes the tax debtor has to pay out of his wealth; if he owns a piece of land with a house and this property is taxed then he is of course free to pay this tax with the money coming from his salary or any other source of income; it does not have to be income which comes from the object of property which is being taxed. In light of this fact, the German Constitutional Court holds that taxes infringe upon wealth, but not upon (pieces of) property and that therefore there is no constitutional protection against taxation on the basis of the constitutional right of property. So one cannot fight taxation with property; one can only fight taxation referring to a restriction of a general freedom which will usually, in view of the rather spongy and unclear concept of general freedom, result in a defeat.

There were, of course, good reasons for the Constitutional Court to choose this narrow interpretation of property in the beginning: a different interpretation under which the wealth of a person would have been considered property in the sense of the constitution would have seriously hindered the legislator and the executive power, which would have been under the continuous menace of the unconstitutionality of their tax laws and other regulations. But this was in the days when taxation was fairly low and certainly not excessive and in the days when nobody could imagine the degree of taxation to which European states at the end of the 20th century have grown accustomed. In those days one did not need a sharp sword against taxation; in our time this may be different.

3. Credits as state income

In everyday knowledge debts are debts and income is income; in economic theory and in budget law this is different. If the state gets money by obtaining credits either from banks or via state loans or some other way then this will appear as income in the budget despite the fact that it has to be paid back some day. It is a fact that all modern states tend, to a growing degree, to get money and cover their budget by taking loans. Whether this is legitimate from the democratic point of view is very doubtful: if democratic legitimacy means self-government by elected representatives then it is obvious that those who have to pay back the credit have not participated in the elections of those representatives which participated in the decision to take up the loan. Of course there are many arguments why these decisions are nevertheless legitimate, from "pay as you use" to the argument that those generations which will have to pay back the loans will benefit from those investments which were financed with these loans. But these arguments can hardly hide the fact that these decisions create considerable burdens without any democratic control. At least the constituency of those who decide to create state income by taking loans will usually not be interested in a very strict control of these decisions because they profit from them or are at least not burdened by their consequences. Again, if political elites were very cautious about financing state spending by loans—in other words, if there were a tacit consensus about the "oughts" and "must nots" in budget law—this would not be a problem. In Germany this was the case in the fifties and sixties when the state was actually accumulating money and not spending all its income. (The money, a considerable amount, was said to be piled up in the famous "Julius-tower", named after the minister of finance, Julius Schäfer). The fact, though, that the Maastricht criteria mostly deal with state deficits and their limits shows that politicians and political elites long ago left this consensus and have discovered loans as an easy and very convenient alternative to raising taxes.

Admittedly, there is an article in the German Constitution which tries to limit state deficits by linking the amount of loans to the amount of investments, but due to very vague criteria, a lot of exceptions and a wide scope of discretion for the government this has not worked very well. Another reason why it has not worked very well may be the fact that a limit on the state deficit in the Constitution will only work if there is some institution of control with effective powers. At the moment there is no such institution in the German Constitution; the Federal Auditing Board, which could be such an institution, does not deal with deficit spending and does not have effective powers, and the Federal

Central Bank does have effective powers, but does not control this sector of government. So everything points towards judicial control of possible violations of this article. Courts, though, may not be in a position to control these things; it is at least obvious that the German Constitutional Court felt very uneasy in the case where it had to decide the question of whether state loans had violated Art. 115 of the Constitution, that is, the article which deals with these questions.

4. The law on the budget and special funds

Another interesting question is what kinds of income and expenditures are in the budget and what kinds of income and expenditures are executed outside the budget; in other words, which parts of the income and spending are public and therefore (hopefully) controlled by parliament and by the public and which parts remain hidden. If we again take the German example, we find two significant and intertwined problems.

Theoretically, one of the basic principles of German budget law is the unity and singularity of the budget *(Haushaltseinheit)*: there should only be one budget and all the income and all the spending should be in this one budget so that the passing of the budget law will imply the all encompassing and integrated exercise of the budget rights by parliament. It is another principle of budget law that this first principle is not relevant for the budgets of separate legal entities under public law, of special funds *(Sondervermögen)* and of economic enterprises of the federation. This means that the federal finances are in fact divided into many separate budgets which may or may not appear in the budget law and which can be exempted by federal law from the restrictions of Art. 115 of the Constitution concerning loans. The point of interest is the fact that this possibility of separate budgets has always existed and that there were good reasons for such structures: for example, autonomy for those legal entities which organized the integration of certain professions. But again we have to note that an instrument of traditionally limited use has become more and more popular and has long left behind its once legitimate goals; nowadays these special budgets are used for hiding large debts and for giving uncontrolled spending power to the government. Let me point out that already in 1991, that is before we really started to take a lot of loans, the debts of all these special budgets constituted about 460 billion marks.

A second serious problem is a change in the nature of these special funds. Let us first look at some traditional special funds and their financial and asset structure. Two typical examples are the Federal German Railways and the

Federal Mail. It is logical that the debts of these special funds are not considered state debts from the point of view of the budget; Art. 115, which we mentioned as limiting state debts, cannot be applied to these types of debts. In a way this was acceptable for the traditional type of special funds because, as a rule, these special funds had very valuable assets of their own—land, buildings, machines, etc.—which could have functioned as security for the commitments and liabilities of these special funds in the case of insolvency; in other words, the state budget would not have been involved in the coverage of these liabilities or at least only to a very limited extent.

Nowadays, and in the aftermath of the German reunification, the "new" special funds are very different. Most of the former GDR liabilities (either liabilities of the GDR itself or liabilities which were generated in the process of the privatisation of the GDR economy—for example, when the Treuhand had to sell an economically weak enterprise free of debts and therefore had to transfer the debts to itself) have been covered by special out-of-budget funds which are therefore not subject to parliamentary or public control. It seems to be the combination of two characteristics which makes this fact disquieting. On the one hand, we are talking about very large amounts of money: the estimates range between DM 350 billion and 500 billion, the latter figure being much more than half of the yearly federal budget. On the other hand, these special out-of-budget funds are just liabilities and have no assets at all so they clearly should be a part of the budget because they will have to be covered and paid back out of the state budget. So again we are confronted with the fact that a traditional institution of budget law which used to function maybe not in an ideal, but at least in an admissible way is being used out of the context of the silent traditional consensus which excluded abuse in the past. Apart from that we have the problem of nontransparency (and in a matter of budget law that means that the whole affair is doubly nontransparent).

5. Fiscal domicile

The point that I want to make now is of great relevance for federal or decentralised states and of less relevance for unitarian states, depending in each case on the system of tax allocation. If you want to levy taxes in a federal or decentralized state you have to decide on a principle which tells you where people and legal entities are obliged to pay taxes. As a rule it seems logical to say that taxes are paid to the territorial entity where a given citizen or corporation lives or is situated. But this simple and logical system creates

certain difficulties. One of them is specific for the German Federation with its "city-states" like Berlin and Hamburg where many people work in the city-state, but because of lower living costs or better environmental conditions prefer to live in the state which lies around this city. In this case the taxes will be earned in one state and paid in another state or, in other words, the taxpayer will not finance a large amount of the social benefits which he gets at his workplace.

The other problem is more serious and can probably be found in any decentralized state. Corporations are usually free to have the headquarters of their firm in one place and production facilities in other places (as far as these firms have their headquarters in large cities this is actually what you want because of pollution, etc). If you now tax these companies at their headquarters, then the regions where the companies produce and which bear the burden of the production as far as costs of infrastructure and environment are concerned will have only these burdens and no benefits at all (apart from a place of work for their inhabitants). Looking east for once, this seems to be a big problem in the Russian Federation. Things are even more complicated if you have a decentralized taxation system and you allow free competition between the regions (or states). The poor regions will tend to create favorable taxation conditions and thus try to attract the big companies either just for their headquarters or for production as well; the companies will minimize their costs by being mobile and nowadays they will do this easily in view of the possibilities of electronic communication systems. The competing regions will then proceed to do the same: the result is high mobility—this alone will cause certain costs—and an obligation of the center to somehow balance the budget problems of the regions suffering from this taxation mobility. We do not mean to say that there should not be competition in favorable tax conditions between states or regions, but one should be aware of the costs and the regions should collect taxes for those costs and burdens which occur on their territory.

6. Special fiscal charges

Traditional fiscal theory (in Germany) only knows a limited number of types of fiscal charges: taxes, fees and duties. In everyday life any fiscal charge has to adhere strictly to the typology with the taxes enjoying the least restricted status. Theoretically, whenever the state squeezes money out of its citizens this must correspond to the structure of one of these charges: if it does not or if the state has not chosen the adequate type of fiscal charge for the given purpose then this will be illegal and the citizen will get his money back—if he or she is clever

enough to sue. In other words, the judicial control will be based on a very formalized concept of fiscal charges and not so much on the control of the content of the charge; this is especially so with taxes.

On the one hand it is important to understand the limited possibilities and this specific formalized approach of judicial control in fiscal matters, both of which are due to the special nature of the subject. On the other hand, it is equally important to be aware of the fact that the state will try to get as much money as possible from its citizens and that it will, in the process of doing this, be very inventive in finding new types of fiscal charges. In the Federal Republic of Germany this urge of the leviathan has resulted in the invention of so-called "special fiscal charges" *(Sonderabgaben)* by which we mean charges which are not taxes and which are charged only to a specific group with a specific shared interest; the group as a whole must either profit from the charge or it must bear some special responsibility which this special fiscal charge is meant to balance. Apart from that, at least in theory, this special fiscal charge must be limited in time and must not be used for the general financing of state expenses. There are good reasons to doubt whether these special fiscal charges are a good idea; they nevertheless show three interesting characteristics of a rational and flexible budget law. On the one hand, they open the possibility of state-initiated social solidarity where the money circulation is decentrally channeled between groups with a common social interest. On the other hand they introduce a new element of control and legitimacy into the legal construction of fiscal charges by the very fact that they are limited in time and have to be renewed and therefore to be legitimized anew. Last, but not least their fairly clear elements make them better suited for judicial control and therefore improve the legality of fiscal charges in general. So one conclusion of this new type of fiscal charge may be that a multiple and differentiated typology of fiscal charges will improve the legal situation of the citizen in the domain of budget and fiscal law, which is a very traditional and authoritarian enclave in the more modern legal systems of our time.

7. Financial division of powers

There are growing doubts about whether the traditional parliamentary system with its traditional threefold division of powers is ideally suited for the modern state. I do not want to be misunderstood: the system is still superior to any other system invented so far. On the one hand, there are problems with which—at least in Germany—the system is just unable to cope: the best examples are the

financing of parliaments and parties where you have an unholy non-neutrality on the part of the decision-makers *vis-à-vis* the subject and where even a change of the system would have to be effectuated by those same decision-makers. The result is that nothing is changed and you have a ping-pong game between the constitutional court, which declares the respective laws to be unconstitutional, and parliament, which then again passes a new law in its own favor or in the parties favor; this is the one item in which all the deputies have a common interest. It is interesting to note that not only the verdicts of the constitutional court, but also the rebukes of the Federal Auditing Board are without effect. This fruitlessness of the inbuilt mechanisms of control seems to indicate a structural problem in matters of money and spending.

If one searches for more positive features in the area of state finances and money one will find these in the institution of the independent Federal Central Bank; the independence is, it is again curious to note, only guaranteed by the "Law on the Federal Bank" and not by the Constitution. (Interestingly enough, the possibility of a transfer of the functions of the Federal Central Bank to the European Central Bank, now provided for in the new version of Art. 88 of the Constitution, mentions that this European Bank must be independent). So as far as the printing of money by the state and creation of money by private banks by means of loans is concerned, the power of decision lies with the Federal Central Bank only. This outsourcing of decisions on money out of the domain of parliament and government has proven to be very valuable and has stopped the government's and parliament's urge to get rid of economic difficulties by printing more money. It is significant for example that the one-to-one exchange of GDR money with the money of the Federal Republic shortly before the reunification—undoubtedly one of the reasons for the economic difficulties that the FRG is experiencing at the moment—had been declared upon by the Federal Central Bank an economically unsound (but maybe politically necessary) decision. Apart from that there are many other examples where the Federal Central Bank has decided against the government and withstood enormous pressure, and history shows that the mere existence of an independent central bank has a very disciplinary effect on government actions: the latest example is the reevaluation of the FRG gold reserves to meet the Maastricht criteria which was torpedoed by the Federal Central Bank.

We have called this independence of the Central Bank "outsourcing". If one wants to express this differently one might say "division of labor" or even better "division of powers". In my opinion this is the interesting lesson which one can learn by looking at the very unpleasant events in party, government and parliament financing on the one hand and the pleasant effects of an independent

control of money circulation on the other hand: the division of powers must be suited to matters of budget and finances or there must be a financial division of powers. Let me just add the aperçu that division of powers began with the budgetary control of the king.

8. Tacit consensus and second generation budget law

We have tried to show some oddities and some more positive institutions of German budget law with the specific good of identifying some preconditions of a budget and finance system which would be up to the standard of other areas of modern constitutional law, especially basic rights, and which would be worth exporting. I would like to point out two aspects which in my opinion are worth a second thought (in general and for the creation of a rational budget system in the countries of Central and Eastern Europe).

Budget law, maybe even more than other areas of law, is based on tacit pre-consensus and pre-knowledge about what one should and what one should not do. For a long time these shared unexplicit views have functioned as an invisible control mechanism preventing abuse where the written law did not provide any limits for government and parliament. It seems that some of this tacit consensus has faded away and that consequently the "oughts" of budget law have to be made explicit in order to find a new and transparent common denominator. (For the FRG or for other Western countries this will not solve the question of who will be interested in such a regulation and therefore implement it. But for Central and Eastern European countries which have to draft a new budget law anyway this problem is not so relevant; nevertheless, these countries should search for and find their own tacit preconsensus and check its validity.)

We need a second generation or new type of budget law which does away with dear old habits, and we should try to accompany this with a new institutional structure with the objective of having a functioning and well geared system of division of powers in matters of finances and budget. In my opinion it is important to see that independent institutions of financial control—whatever they may look like and whatever objectives they may serve—are a valuable addition to the traditional parliamentary system. Of course such a system will result in a certain limitation on the powers of parliament and thus limit popular sovereignty as a basic element of democracy. Constitutional courts do the same, were met with the same critique and are nevertheless now considered to be an indispensable element of modern democracies.

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Comments on the Paper of Alexander Blankenagel

Not being a specialist on tax law myself, our exchanges during the symposium gave me the opportunity to better appreciate the function of the respective provisions in our different constitutions. It is not only a technical matter but a specification of more general principles: for instance, the democratic idea applied to financial, economic and social policy. The differences between our constitutions in the treatment of taxation are not mere details of procedure but provisions of great importance for the process of transition to democracy or for the often painful reform of the welfare state. We indeed have to reflect as constitutionalists on the function of norms which contribute to frame economic behaviour where economic behaviour may be a condition of institutional stability and therefore of democracy itself. It is not sufficient to elaborate on our more traditional subjects like elections, legislative procedure, free speech, the principal of equality and other fundamental rights as long as we do not thoroughly understand the relation of those principles to the rules that are intended to govern the way people contribute to the state's budget as well as the state's contribution to the citizens' welfare and welfare opportunities.

The paper of Professor Alexander Blankenagel shows precisely the function of provisions concerning taxation in constitutional law and the questions he raises are questions about the nature of contemporary constitutional law itself.

I may begin with seizing this opportunity to say a word about a conceptual issue appearing in the title of our conference—"Financing Constitutional Identity", not to say something particularly new, but in order to state explicitly

the way I understand our proceedings. The problem is whether taxation may be an element of the "identity" of the constitution.[1] I assume that "identity" in a strong sense exists between any two objects A and B if any property of A is a property of B.[2] Using "identity" that way means that we are asking ourselves whether the elements of a given constitution contain provisions about taxation and, if this is the case, no other constitution will be identical unless it contains precisely the same elements, concerning taxation or any other questions. In other words, any constitution will be different from any other constitution and even the slightest change in it makes it different from what it was. This is a narrow, not to say trivial, result. I do not think we are gathering here simply to notice

1 By "constitution" I shall mean, for a given legal system, the set of norms having as its object the conditions of validity of personally and circumstantially general norms, i.e., norms, the formulation of which contains no proper name and which do not apply to only one individually determined set of circumstances ("constitution in a material sense" or "materially constitutional"). It is not necessary that such norms be themselves produced in a certain way in order to be considered "constitutional"; if, however, the production of at least a subset of constitutional norms is submitted to certain particular conditions (e.g., a qualified majority or a referendum), the set so determined will be called "formally constitutional". We shall concentrate on the material constitution which is a necessary subset of every legal system. The German *Grundgesetz* is of course an example of a formal constitution containing the main part of the material constitution. Cf. concerning that distinction: PFERSMANN, O.: "La révision constitutionnelle en Autriche et en Allemagne: théorie, pratique et limites." In: *La Révision de la Constitution*, Paris, 1993, 7–65.

2 The literature on "identity" fills volumes. What is called "strong identity" is nothing but Leibniz's principle of the identity of indiscernibles (see for instance LORENZ, K.: "Die Begründung des principim identitatis indescernibilium." In: *Akten des internationalen Leibniz-Kongresses Hannover, Studia Leibnitiana Supplementa III*, Wiesbaden 1969, 149–159). Identity through time has interested philosophers (PRIOR, A. N.: *Papers on Time and Tense*, Oxford, 1968; QUINE, W. V. O.: *Word and Object*, Cambridge, Massachusetts, 1960; Amely O. Rorty (ed.): *The Identities of Persons*, Berkeley, Los Angeles, London, 1976; SHOEMAKER, S.–SWINBURNE, R.: *Personal Identity*, Oxford, 1984; see also the recent collection of articles by STRAWSON, P. F.: *Entity and Identity and Other Essays*, New York, 1997 and COPELAND, J. B.: "Vague Identity and Fuzzy Logic." In: *Journal of Philosophy*, 94, 1997, 514–534, political scientists and political philosophers (see for instance the special issue of *Philosophical Forum: National Identity as a Philosophical Problem*, Fall-Winter 1997) psychoanalysts (E. E. ERIKSON: *Identity and Life Cycle. Three Essays*, New York, 1959) and social scientists (see the recent anthology by Lewis P. Hinchman, Sandra K. Hinchmann (eds.): *Memory, Identity, Community: The Idea of Narrative in the Human Sciences*, Albany, 1997; SEEBRIGHT, M. A.–KURKE, L. B.: "Organizational Ontology and the Moral Status of the Corporation." In: *Business Ethics Quarterly*, 7, 1997, 91–108. Legal theory has not until now shown the same interest.

that there are different constitutions; I suppose we are interested in "identity" in a weak but nevertheless precise sense, which we may call "constitutive identity", i.e., those properties that make an object O, *during a period P* (ti-tk), remain this *same* object, although certain of its properties or elements may have been modified. This is, by hypothesis, incompatible with strong identity. The problem here is that the intuitively very appealing notion of constitutive identity is both subjective and indeterminate. We may indeed consider that *some* properties or elements have to be the same over time for an object to be the same, we can restrict strong identity to a pertinent subset, but our choice will at best be stipulative. If we cannot find an intrinsically objective criterion, at least should we try to propose one that permits a pertinent analysis of an "object". If subjectivity in our choice is unavoidable, at least it should be plausible that this choice leads to a result. If we can determine a relatively precise criterion, then it will be at least extrinsically objective.

In fact, constitutions can be modified in two ways while preserving some strict identity. First, every modern constitution contains rules of different weight. The abolition of the monarchy would affect the shape of the British Constitution[3] more than a change in the norms of succession to the crown in absence of direct heirs. The transformation of the Federal Republic of Germany into a centralised state would evidently be perceived as more important than a modification of the distribution of competencies between the Federation and the *Länder*. Identity remains preserved if those provisions we consider essential remain unmodified, at least in their very content. The second way concerns procedures: some constitutions introduce a weighing of their components and every formal constitution determines by definition the conditions of constitutional continuity. In Germany, the federal structure cannot be—constitutionally—abolished, whereas the competencies may be reshaped within certain parameters.[4] The German Constitution does therefore formalise its "identity": certain things cannot be changed without destroying the *Grundgesetz*. But what shapes identity when there is no such explicit and formalised distinction between the changeable and the unchangeable? Are we constrained to limit ourselves to what these explicit rules say? If there is no constitutionally determined content-identity of the constitution, then we cannot tell very much about the identity of a constitution C1 except that the modification of it without respect the rules concerning such a change results in a violation, precisely a

3 The British Constitution is only material, of course.

4 See the famous Article 79, Paragraph 3 of the *Grundgesetz* (on its interpretation PFERSMANN: *op. cit.*).

break of constitution. Procedural identity is strictly objective but may be considered, at least in most cases, uninstructive. The passage from the fourth Republic to the fifth Republic in France was constitutionally a "simple" revision of the former constitution, but the content of the constitution of 1946 has little similarity to the constitution of 1958; on the other hand, one can hypothesise that the reform of 1962 introducing the popular election of the president was a violation of the constitution of 1958, but many people consider it to be the "perfection" of its architecture.

Alexander Blankenagel is not only reflecting on what constitutes the tax-identity of German constitutional law, because then he could only have described the provisions pertaining to that domain. He is also asking what this tax identity *should* be, at least pointing to what in his view should be avoided. A discussion of this problem of normative identity requires that we elaborate on what the principal properties of the tax constitution really are. My thesis will be that we should distinguish three levels of investigation. The "classical financial constitution" will be compared to its concrete appearance (I), then to the contemporary "level-diversified financial constitution" (II).

I. Classical financial constitutional law

Since *Magna Charta* taxation has been perceived as the motive for the introduction of political representation as well as for the democratisation of representative institutions. But the "classical financial constitution" goes back to the constitutional revolutions of the end of the 18th century, the American and French idea that the people or the nation consents, through elected representatives, to the financial burdens it will bear and to the actions that will be realised in their name with those resources.[5] This consent is not given once and for all times or as long as it is not abrogated (unlike other legal rules), but has to be obtained regularly, i.e., once a year or even more often if corrections are necessary. Furthermore, the parliamentary representation does not vote on a global unspecified amount, but every resource and every expenditure has to be made explicit in the budget law.

Did this abstract democratic model really work? It did not for different well known reasons:

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5 See the Constitution of the United States (1787), Art. 1, Sec. 7, 8, 9, 10 or the French Declaration of Rights (1789), Art. 14.

— The sovereignty of parliamentary representation in Britain and France (until 1958), for instance, gives the majority the possibility to violate constitutional rules. The fact that the government is nothing but the executive representation of the parliamentary majority means that this very majority has no interest in controlling the government.

— In the case of a strong separation of powers—like, for instance, in the United States Constitution—decisions have to be negotiated. The interest of the constitutional partners is therefore to get the best outcome for their own respective goals, which is not necessarily the interest of the represented citizens.

— Besides being a normative authority, the state became an entrepreneur, even if it is nowadays often considered a bad one and even if most states are in reducing their economic commitments. Whereas the predemocratic state was largely conceived as the private property of the sovereign, the democratic state tends, as far as its economic action is concerned, not to use its public power, but to act as one private person among others, obviously with a somewhat privileged position. But under private law it often escapes the more severe rules of public law as well as parliamentary or state audit office control.

There are many varieties of economic activities of the state which benefit from budgetary expenditures without being submitted to full budgetary control: from state owned industries to research centres or social insurance institutions. In France for instance, social security is not part of the states budget except for the bill of its deficit. A constitutional reform was necessary to give the parliament competence to decide the parameters of its budget, but the parliament is "still not the master of social finances".[6]

Such phenomena can be found in any constitutional democracy. The budget is neither truly universal, nor really transparent, nor is it, in any determinate sense, the expression of the common interest of the citizens even if the constitutions seem to say so. That might still be better than other systems without representation and it surely is, but this is not our concern. My point is that the traditional picture of classical financial constitutional law is nothing but an ideological tale about the legal systems in question, not a precise description of their real content.

Professor Blankenagel shows that in the German case the national representation does not control many actions taken in the name of the state or at least with money coming from its citizens: state loans are legally considered revenues

6 Cf. the very pessimistic conclusion of Loïc Philip on this topic in: "La révision constitutionnelle du 22 février 1996". In: *Revue française de droit constitutionnel* 27, 1996, 451–460.

but are effectively long term expenditures, special funds (mail, railways) are placed outside the budget, but they do affect the state deficit when they are themselves in a deficit position. Technically, the problem seems to be a question of determination of the relevant domain. If something appears to be outside the competencies of the parliament, while it should in principle be part of those very competencies, then something has not been formulated in accordance with the explicit objective. Once that cause has been identified, the remedy is at least juridically simple: a constitutional reform is necessary to make the legal system consistent with its aims of parliamentary control of taxation and the state budget. Whether or not this is realised is a political, not a legal issue. If the politicians do not accept or do not undertake the reform, it is because they do not want the system to be consistent with those outspoken objectives.

But besides this, the picture of classical financial constitutional law is false because it does not take into consideration one of the most important properties of contemporary constitutional law, namely, that it is hierarchically diversified. Furthermore, its provisions may be limited or overruled by norms of international law. This is especially the case, as with Germany, for the member states of the European Union. Restricted though the respective treaty provisions may appear in scope concerning taxation as such,[7] the impact on budget law and thus indirectly on the whole tax system through regulations concerning monetary and economic policy is one of the main aspects of the recent development of the European integration.

II. Level diversified financial constitutional law

At first glance, some new developments in constitutional law seem to propose a remedy for some of the problems mentioned above. If the legal reality of tax law contradicts the constitution, then it suffices to introduce a constitutional court or at least to give a supreme court competence in constitutional cases. The parliament cannot, then, do whatever it likes. It can neither do more than what it is permitted to do nor can it do less than it is obliged to do. The latter concerns cases of unconstitutional transfer of competencies to the government or to persons acting with state money but outside the control of state organs, the

7 See Part III, Chap. 2 of the Maastricht Treaty, Art. 95–99 becoming Art. 90–93 Amsterdam Treaty as soon as it comes into force. It concerns non-discrimination through V.A.T., elimination of double-taxation and harmonisation in the domain of indirect taxes on consumer goods.

former concerns cases where the constitution protects the individual against the state.

The problem here is not to decide whether or not judicial review is democratic or not. The point is that such courts, with or without direct or indirect democratic legitimacy, are entitled to say what exactly the constitution really requires. It generally does not exactly require, according to those courts, what the ideological picture of classical financial constitutional law is believed to prescribe. It appears therefore that all constitutional rules cannot have the same weight because the courts have to say—and they actually do say—which rules have more weight than the others. Professor Blankenagel gives a very clear example of this development when he points to the judgments given by the German Federal Constitutional Court concerning the protection of property: the court deems that taxation overrules property, at least to a certain extent.

But again, if this is not what the representatives wanted the court to do, they could have simply changed the constitution. Indeed, this is not politically realistic in any legal system, because some constitutions like the American one are very difficult to modify. But all matters we are discussing here are not of such a nature that they would *per se* make a constitutional reform unconstitutional, i.e., forbidden by an explicit constitutional limitation of the possibility to modify the constitution. In Germany there are such explicit limitations, but they do not concern taxation—they concern the democratic principle instead—and constitutional reform is relatively easy to realise, easier for instance than in France but less perhaps than in Austria.[8] The point is that it is a political problem, not a legal question, whether taxation is deemed so essential to constitutional democracy that, if an inconsistency appears in the system, all political forces would join in a common effort to amend the situation. If they do not, then this means that the constitutional majority is in favour of the *status quo*.

In fact, really fundamental changes were not introduced in order to better protect the citizen against the state—at least not as far as taxation is concerned—but in order to protect both the state and its citizens against themselves because they are considered abide by long-term decisions once they are made.

The solution was found in Germany with the introduction of an independent central bank and the idea was carried over to the European Union by the Maastricht treaty and completed by the stability pact. A law that is, an act,

8 For a comparison of constitutional reform in Germany and Austria cf. PFERSMANN: "La révision constitutionnelle en Autriche et en Allemagne..." *op. cit.* 7–65.

democratically elaborated and voted by the parliamentary assemblies has introduced an independent federal bank in the Federal Republic of Germany. The European Central Bank has been introduced by an international treaty, i.e., an act which, besides going through all procedures required by international law, is ratified democratically by all member states of the European Union, be it by parliament alone or by parliament plus popular referendum. But the result of this democratically enacted convention was that future decisions would not be democratically enacted.

The design is entirely different from constitutional review because it limits the intervention of democratically elected organs to the right to appoint certain officers of these new institutions. But unlike in the case of constitutional courts, it is not possible for democratically elected officers or for the citizen to address any complaint to it or to sue the states or the Union for any rule violation. The independence of the federal bank and now of the European Central Bank is therefore much stronger than the judicial independence of a constitutional court which has to decide when invoked by authorised people and according to the terms of the constitutional writ.

For a very long time however, this *legally strong* independence was *constitutionally weak*. The old article 88 said simply: "The Federation establishes a money and issuing bank as a federal bank". Thus the point was that the Federation had competence to set up the institution by appropriate legislative and administrative measures. But the independence from political power was not guaranteed by the Constitution.

Since Maastricht things have changed. The Fundamental Law was modified in 1992 in order to conform to the treaty. Two new sentences were added which read: "Its task and competence may be translated, within the frame of the European Union, to the European Central Bank, which is independent and committed, as its prime objective, to price stability". The independence of the European Central Bank is thus guaranteed not only by the Constitution, but by an international treaty which can be modified only by a revision of that very treaty. When the constitutional court nullifies a law in Germany, the parliament can modify the Constitution in order to overrule the judicial decision (within the limits of constitutionally permissible modifications of the Constitution); when the European Central Bank makes a decision, neither a national nor a European organ, whether parliamentary or not, can overrule it, only a new treaty could. That seems to be the very reason why the legal powers of the European Central Bank are much more difficult to integrate into democratic theory than even the introduction of constitutional courts. It goes directly against the basic assumptions of classical financial constitutional law.

There may be two solutions to this dilemma. One is formal-abstract, the other procedural.

The formal-abstract approach will invoke an analogy with traditional arguments of classical constitutional law as a line of justification. Democratic representation, it will be said, does not represent a simple sum of persons, but an abstract and ideal entity which is the *nation*, including the general interests of those who cannot vote as well as of future generations. In the same way, the European Central Bank has to be conceived of as a supra-national organ representing the well considered interests of an emerging supra-national entity, precisely the European Union. But this argument recognises candidly that the citizens as well as the national organs are unable to act in accordance with once decided long-term interests. And this stands in flagrant contradiction to principles of classical financial constitutional law and to the principles of democracy.

The procedural approach consists in distinguishing levels of norms and therefore levels of producing procedures. As in all legal systems, certain rules can be established by the administration, others need a statute and hence the intervention of parliamentary representation, others still an amendment to the constitution or an international treaty.

The problem is not one of legal technique but is partly a question of perception and acceptance of legal technicality. Of course, this growing stratification makes legal phenomena, already perceived as opaque by the citizen, still more obscure, because they become more and more technical and complicated. But perception and management of complexity is an issue of legal culture. One cannot claim a highly developed *rule of law* and simultaneously regret that the law does not consist of a small set of simple rules. A complex society produces and needs a complex legal system. Besides this, it certainly is a problem to make this acceptable to the persons concerned. It requires that lawyers be on the whole honest rather than dishonest, competent rather than incompetent, etc. That, unfortunately, is not a problem of law, but a problem of using the law.

Of course, it is also a problem of democratic legitimacy. The relevant principle concerns the possibility of making a hierarchy of procedures of norm-production. It appears to be a constitutive feature of the distinction between constitutional law and legislative law. More generally, a hierarchy allows us to differentiate rules according to the weight attributed to each rule. If one accepts that principle, it appears not implausible that to enact certain more important rules requires a more complicated procedure, entailing a higher degree of consensus. The principle of hierarchism goes against the principle of representation: if at the lowest level the simplest representation of the citizens is

considered sufficient, a higher level will require more than the common minimal consent and so forth.

If one wants to bind oneself for a very long period without any possibility of opting-out, this does not seem *a priori* irrational or unjustifiable if the decision is taken in full appreciation and conscience of its weight and consequences. This in turn calls for a procedure that makes those very features clear and explicit to the citizens or their elected representatives who accept the rule and it calls for a procedure that requires a very large consensus.

The question is then whether it is democratically justifiable to make decisions binding for long periods. Let us have a closer look at this recent development in constitutional law. The aim of the rules here in question consists either in transferring competencies to organs—the members of which, though appointed by elected representatives, are neither politically responsible nor submitted to instructions by those very nominating powers, or in the obligation to maintain certain economic policies, whatever the citizens may think of them at any given moment t_n after the treaty came into force and even if a wide majority of them would prefer—at t_n—a change in those decisions. If, therefore, the political authorities of a member state of the European Union want to modify these aspects of economic policy or if they would like to produce a certain quantity of money and thus a certain inflation rate exceeding the limits imposed by the treaty, they cannot do it, *ceteris paribus*, in a legally regular way. But this does not mean that it is legally impossible. It only means that it is forbidden as long as the rules are in force as they presently are and most probably will be when the Amsterdam Treaty comes into force. But nothing limits the possibility of changing the rules themselves except the difficulty of the procedure. What has changed, in respect to previous rules, is not that something once permitted is now illicit, but that the level of difficulty concerning some of the most important issues is now higher than it was before. The long term binding aspect is thus, as for any legal rule, more a consequence of the complexity of the procedure of production than of its intrinsic content. Nonetheless, constitutional hierarchy and the Europeanisation of budget and tax law results in the use of procedural difficulty as a means to forbid short term changes in these very domains.

The other question, then, is whether this hierarchy of production procedures is itself democratic or at least compatible with democratic theory. This, of course, is nothing but the now classic problem of the democratic deficit of the European Union. One can only say that the deficit has been democratically enforced, that the ratification of the institutive treaties has been made precisely as the national constitutions prescribed it. The content of the treaties, admittedly,

restricts democratic control and norm production. But this is a question of democratic politics within all of the countries concerned. Either they want more democracy, but then they have to transfer more competencies, namely the competence that first and second order decisions can be taken by elected European representatives without treaty revision, or they want to limit the transfer of competencies, but the decisions at the European level will only to a minimal extent be taken by elected representatives whereas other organs will, without direct control, make policies as the constitutionally enforced treaty charges them to do or, more precisely, as they believe the treaty obliges and authorises them to do.[9] As things presently stand, European democracy is nearly nothing but national ratification of treaties transferring powers of norm creation to organs with low democratic legitimacy. Whether or not one should proceed this way is a question of political choice. For the time being, the democratically elected representatives, and, it seems, the citizens of the different member states, do not want more European democracy but rather the strictly limited growth of community law.

To conclude, let us go back to "identity". By "identity", we meant constitutive identity which in turn cannot be found but in the highest levels of steering principles of the constitution. Hierarchical differentiation thus structures identity. But then the Europeanisation of long-term decision-making is simply constitutive of the common identity of the member states of the European Union. Why do they fear losing their very identity?

9 Bert Van Roermund tries to elaborate on the identity-dilemma of the relation of national and European law: "Jurisprudential Dilemmas of European Law." In: *Law and Philosophy*, 16, 1997, 357–376.

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The Budget Process in Russia: Problems and Solutions in the Context of Politics

1. Comprehensive approach to the budget process

An economy can be divided into two broad sectors: private and public. Of course, such a division is rather artificial because, first, sometimes a distinction between the sectors is not clear (e.g., state shares in joint-stock companies), and secondly, there is a close link between the sectors, so that decisions made in one of them have direct or indirect consequences for the other (e.g., crowding out of private investment by government spending).

The sphere of public finance in Russia, including extra-budgetary funds, accounts for about 40% of the GDP (1996 data). This percentage does not take into account a number of fiscal transactions which are currently not classified as being part of public finance, such as revenues and expenditures of budget sector organizations engaging in commercial activities, nor does it include operations of state-owned commercial enterprises. Therefore the issue of efficient management of public finance remains as relevant as ever because of its strong impact on the whole economy and society.

What is the current degree of efficiency in the use of public money in Russia? In fact, it is very low. There are numerous examples of significant efficiency

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* Findings and views expressed in this paper are entirely those of the author and should not be attributed in any manner to the World Bank.

losses resulting from weaknesses of legislation governing the fiscal process, and, consequently, the use of arbitrary practices in the attempt to organize that process. The issues outlined below represent only a few such examples. Although they pertain to the federal budget, they are also characteristic, to a varying extent, of regional and municipal budgets:

- errors in the compilation of revenue and expenditure projections of the federal budget for 1996 were subsequently aggravated by the amendments introduced during the discussion of the draft budget at the State Duma, which rendered the law on the federal budget for 1996 unrealistic. In their turn, the increased budgetary spending obligations brought about a growth of budgetary arrears to various groups of recipients and discretionary financing of expenditures in violation of the original allocations. This situation repeated itself in 1997;
- lack of consistency between the budget law and various other laws and regulations determining the nature and amount of government spending obligations, such as the Law on the Federal Budget and the Law on the Budget of the Pension Fund, makes it impossible in principle to ensure timely and full financing of such obligations;
- lack of a clear regulation governing the spending authority of various executive agencies and procedures for the use of budgetary resources generates additional spending obligations. For example, the 1996 increase in the amount of the Russian Army, which had not been budgeted originally, resulted in an increase of military expenditures and wage arrears to the military;
- a discretionary approach demonstrated by the agencies in charge of distributing budgetary resources and by recipient entities towards the selection of counterparts and contractors in the process of budget-funded procurement for the state needs, lack of transparency and competition all lead to inflated prices on goods supplied to the state, lower quality of such goods, losses of budgetary funds, and corruption in government agencies in charge of budget allocations;
- after budgetary funds have been transferred from Treasury accounts to the accounts of distributors and recipients, the actual use of such funds is checked on at best only episodically. No *ex ante* operational control system was in place in principle;
- there are no procedures in place governing sequestration of budgetary funds and ensuring that the legislative branch has ways to control the sequestration process. As a result, budgetary allocation decisions are made in an arbitrary

manner; no reporting is provided on the actual implementation of the budget compared to the originally adopted budget law, which effectively renders the entire budgetary process meaningless;
- the system of federal transfers to the regions, including transfers from the Fund for Financial Support of the Regions (equalization fund), continues to be extremely complicated, which leads to arbitrariness in making decisions on the allocation and disbursement of funds to different regions.

The situation is aggravated by the fact that low efficiency even at one of the stages of the budgetary process can neutralize relatively high efficiency at other stages. For example, incorrect macroeconomic projections, used as the basis for budget formulation and adoption, can make it impossible to execute the budget, necessitate sequestration, and generate budgetary disproportions and government arrears. At the same time, even timely and full financing of an investment project selected on a competitive basis will have zero socioeconomic efficiency should it be proven later that the project is actually of no use to anyone, like building a school without any teachers available to staff it.

Because the problem is so complex, resolving it and obtaining any real gains is only possible if a comprehensive fiscal reform is carried out that produces an impact on all the stages of the budgetary process. For each such stage it is necessary to prioritize specific actions and identify the tactics of reforms so that the strategic objective can be achieved in the long term. The objective is to restore order in the budgetary sphere and ensure the efficiency of the budgetary process in its entirety.

2. Objective and subjective factors slowing down budgetary reform

Why have not such issues been addressed before? In fact, they have been to some extent, like elimination of some extra-budgetary funds, but it was done in a stop and go manner and never in full. Was it because of ignorance, lack of knowledge about what to do and lack of qualified staff? In the beginning of the transition to a market economy all these factors were important, but they are much less important now. To a great extent reform was restrained by political interests of the acting groups, and this can be called a 'subjective' factor. To a lesser extent reform was hindered by technical problems related to the implementation, which can be called 'objective' factors.

As far as the former are concerned, until quite recently neither the federal government nor the majority of the regions have had a real stake in streamlining

the budgetary process, including in the sphere of inter-budgetary relations both in the center and at the regional and local level. This lack of interest has been due to purely pragmatic considerations.

The inflated spending obligations of the federal budget, which cannot realistically be financed with the budgetary revenues actually available, force the federal government to muddle things up when distributing budgetary resources and controlling their use. At the same time, at the stage of budget execution this practice provides the federal government and the Ministry of Finance with real leverage in their relations with the distributors of budgetary resources, these being regions, sectors, and enterprises.

In their turn, the regional leaders exploit their regular trips to Moscow for wrestling the money out of the federal government as a propaganda ploy to prove their ability to deal with the center and to get support among the population, especially on the eve of the upcoming elections of heads of regional administrations. At the same time, concentration of control over the regional budgetary process, lack of real accountability before the local legislatures, and growing centralization of regional budgetary resources at the *oblast* level have all contributed to boosting the power of regional governors. Under this setup, instances of wage arrears in the budget sector and failures to finance spending obligations out of the regional budgets can always be blamed on underfinancing from the federal budget. It goes without saying that regional authorities never advertise the fact that the root cause of underfinancing was the failure to implement the fundamentally unfeasible but still budgeted collection of tax revenue.

Other distributors of budgetary resources—ministries and departments—have their own stakes in preserving the current fiscal confusion. After the hard-won money has been transferred from the accounts of the federal Treasury to the account of the distributor, the latter is effectively free to distribute the money among lower distributors and recipients of budgetary funding at its discretion, and until recently to decide which commercial banks the budgetary money will flow through. There are no ways for the Ministry of Finance to exercise efficient control over the use of the money. In the final analysis, the volume of budgetary flows and the opportunities for manipulating the way the money is distributed determine the influence of a particular government agency and fuel corruption.

Finally, the Federal Assembly itself is also interested in preserving the system of political bargaining over the adoption of the budget. On the one hand, playing into the hands of various lobbies, the Federal Assembly seeks to increase the expenditure side of the budget; while on the other hand, by making

the budget unrealistic it seeks to obtain an instrument with which to continually pressure the federal government. In turn, the government reluctantly agrees to be influenced by such aspirations of the legislative branch, since procedures governing the control of and reporting on budget execution do not exist and the government's hands are free when it has to decide which expenditures will have priority.

The above may be referred to as subjective factors determining the lack of interest in and slowing down of the fiscal reform at various levels of the executive branch. It must be stressed that the situation has recently started to change: the Ministry of Finance on the one hand, and some of the donor regions on the other hand, have started to look for ways of changing the existing fiscal system with a view of making it more transparent, better regulated and more efficient.

Besides subjective factors, there are also objective ones which make it impossible to carry out the fiscal reform over a short period of time. For instance, the switch of budget execution to the Treasury system requires that an extensive system of departments and offices of the federal Treasury should be set up in all the subjects of the Federation and their constituent municipal and local entities: *rayons, okrugs*, etc. In addition to the agreement with the member of the Federation, the lack of which currently prevents Treasury departments from being established in such regions as Tatarstan and Bashkortostan, it is also necessary to provide technical resources, select and train personnel, and organize information flows and document processing in order to enable the Treasury system to operate efficiently. This cannot possibly be done within an acceptably short time.

Similar problems of an objective and subjective nature confront the attempts to bring all financial flows of the government and government organizations and institutions into the budget in order to be consistent with one of the fundamental principles of public finance—the principle of integrality. Here we are referring to three changes of principal importance:

— first, the consolidation in the budget of all the extra-budgetary funds, the social extra-budgetary funds (Pension Fund, Social Insurance Fund, Health Insurance Fund, and Employment Fund), and the road fund. The nature of the consolidation may vary from arithmetic addition of revenues and expenditures of an extra-budgetary fund to the corresponding revenues and expenditures of the budget to full consolidation whereby the administrator of the fund becomes a distributor of budgetary resources and resources of the fund lose their targeted nature;

- second, the compilation by recipients of budgetary resources and government-owned (*kazyonnyie*) enterprises of consolidated reporting in accordance with the budget classification. This reporting would include all budgetary and commercial sources and outlays (revenues from the provision of paid services, leasing of premises, etc., and their use). The inclusion of that reporting into the corresponding budget would make it possible to have a realistic picture of the amount of financing available to various budget-supported sectors, keep revenues and expenditures of budget sector organizations under control, and introduce a corresponding adjustment into the fiscal policy;
- third, the registration of and reporting in the budget document on the tax privileges and exemptions at the levels of the budgetary system at which such privileges were granted; in the context of the international practice of granting tax exemptions, their registration should make it possible to assess the real cost of such privileges and exemptions for the budget, and determine how efficiently they are used in various sectors of the economy.

Naturally, the stakeholders—budget sector organizations, the administrators of the extra-budgetary funds and commercial banks servicing them, various lobbies in legislative and executive agencies—refuse to accept changes aimed at increasing the efficiency of the budgetary process and strengthening control over the use of budgetary resources. At the same time, the technical work related to the changes (compilation of methodological instructions on the use of the budget classification, personnel training, assessment of the amount and efficiency of tax exemptions, etc.) requires a lot of time and effort.

What then could be incentives to reform the fiscal system, first and foremost, in terms of overcoming the subjective factors? It appears that such incentives can be generated both "from above" and "from below". Incentives "from above" mean incentives generated by that faction which was brought into the government in the spring of 1997, which is interested in the creation of a sound economic foundation to promote their own political objectives, and which realizes that the collapse of the budget would play into the hands of the political opposition. In the efforts to attain its objectives this "strategically thinking" faction in the government (which may be called "new bureaucrats") enjoys the support of Russia's leading commercial banks, which realize that their strategic interests are linked with the preservation of political and economic stability in society and which are ready to sacrifice short-term gains (for instance, in connection with the transfer of budgetary accounts from commercial banks to the offices of the Central Bank and *Sberbank*) in order to secure strategic ones.

Besides, incentives can and must be generated "from below" as a result of the evolution of a civil society which is interested in streamlined and transparent operations with public finance and expresses its interests through democratic election procedures at all levels of power. In the final analysis, civil society is both the end and means of reforms carried out in this country.

It is probably worth thinking about the lack of a proper budget legal base as another subset of the objective factors that slow down the reform in the budget process. On the one hand, the budget legislation is weak and incomplete with many loopholes. On the other hand, there are some clauses in the existing legislation that potentially can generate legal and constitutional disputes if the budget reform goes forward. For instance, independence of regional budgets is interpreted in such a way that the center is not allowed to check regional budgets, and federal transfers may not be ear-marked and forwarded to end-users through the federal Treasury network. It opens a lot of opportunities for misuse of public money at the regional level.

Yet the very existence of ambiguous budget legislation was caused by the subjective factors. The core of this legislation appeared at the time of hot clashes between the executive and legislative branches, and between the center and regions. Thus as a compromise solution many fundamental issues intentionally have not been touched in the legislation.

3. Reforming inter-budgetary relations

Establishment of a balanced system of inter-budgetary relations is one of the key objectives of fiscal policy. Ultimately, political, social and economic stability in society will depend on how efficiently this problem is resolved. The problem acquires special urgency in federal states in which emphasis in the process of formulation and implementation of economic and social policy is by definition shifted towards regions, members of the Federation. That is why the issue of reforming the system of inter-budgetary relations is worth a special discussion.

In principle, there is no readily available recipe for organizing relations between budgets at various levels that would apply to all, or at least to the majority of countries. Too much is determined by historical, national and cultural factors, as well as by the level of social and economic development of individual regions and the country as a whole.

At the same time, the application of fundamental principles of the theory of public finance, which are common to all countries, makes it possible to identify how to move towards greater efficiency of the national budgetary system.

One of the main principles of public finance is to ensure economic and social efficiency of government expenditures. If the federal budget appears to be the most efficient source of budgetary financing of a specific type of expenditure, then it is the federal budget that should have the obligation to finance that expenditure. One of the combined ways would be to finance expenditures from one budget level, while financing the delivery of public services to consumers from another budget level (delegation of expenditure mandates). In this case the upper level budget determines the earmarked allocation of expenditures, while the lower budget uses such an allocation as the basis for distributing the money among specific recipients.

The efficiency of various types of public expenditures can be assessed based on the following considerations: whether the object of financing was chosen correctly; whether the budgeted public services are really delivered to the intended recipients; and finally, the significance of the resulting social and economic impact. For example, applying this principle to the education sector means that financing really goes to schools (rather than to advanced training courses); that the allocated funds really reach the intended schools and are subsequently used for the teaching process, which eventually ensures the required academic standard of students determined on the basis of examinations and/or control tests.

Based on these criteria, as well as on a comparison of international experiences, the tentative picture of expenditure sharing among budgets of various levels may look as follows:

Sources of financing. The central (federal) budget assumes the obligation to finance the defense program, foreign policy and international activities, environmental programs, development of inter-regional commercial links, payments to immigrants and the unemployed, and operating railways and air lines. Budgets at all three levels have the joint responsibility to finance education, health care, social protection, industry and agriculture, the road sector, and production of natural resources. The budgets of the medium and lower levels are responsible for financing law-enforcement activities.

Actual delivery of public services to consumers. The central budget transfers funds to the two lower budget levels to finance environmental programs and functional expenditures financed jointly by budgets of all three levels. In all other respects, the breakdown of public service delivery coincides with the breakdown of the source of financing.

Sources of financing must be distributed among budgets of various levels with account taken of fiscal obligations to finance specific types of expenditures and the role performed by specific sources of financing—federal, regional or local.

Revenue sharing. The system of assigning individual taxes to budgets of the corresponding level, which was stipulated by the first edition of the law on the fundamental principles of the taxation system (specifically, VAT was assigned to the federal budget, while the corporate profits tax to the regional ones), has never actually worked. In 1992 VAT revenues were shared on the basis of bilateral negotiations between the center and individual regions. At the same time, the federal budget secured for itself 47% of revenue from the corporate profits tax. Although a clear contravention of the theoretical principles, in the historical and current Russian context this arrangement helps to ensure the sustainability of tax revenues to the central and regional budgets.

As for the relative importance of tax revenues of different budget levels, it must be noted that due to numerous instances when regions refuse to transfer to the federal level, fully or partially, the federal share of taxes collected on their respective territories, the actual share of tax revenues for the federal budget has always been lower than originally envisaged. Since 1994 VAT has been shared between the federal and regional budgets in a proportion of three to one, with the exception of some regions, which entered into special arrangements with the center. After the federal share of the corporate profits tax was reduced in 1993 from 47% to 31%, it was raised again to 34% in 1994 and to 37% in 1995–1997. It was the changes in the sharing of corporate profits tax proceeds, as well as the reduction of that tax's role for the budget that determined the dynamics of the ratio of overall tax revenues of the center and the regions in 1992–1996 (see *Table 1*). After the share of tax revenue actually received by the federal budget fell sharply from 55% in 1992 to 41% in 1993, it then rose again to 46–48% in 1994–1996.

A comparison with other countries shows that in Russia the degree of tax revenue centralization is considerably lower than the average for member-countries of the European Union and member-countries of the OECD. At the same time, it is higher than in such industrially developed federations as the United States, Canada and Germany (see *Table 1*). The high degree of differentiation among regions in terms of their economic and social development, which has become even more pronounced since 1991, requires that a larger amount of funds be redistributed among the regions. This shows that, provided other conditions are equal, the current level of revenue centralization in Russia is approximately consistent with the criteria of long-term equilibrium, although in 1995 and especially in 1996 Russia was lagging behind developed economies in terms of the overall actual tax burden (see *Table 1*).

Table 1

Assessment of tax burden in Russia and OECD countries in 1993

	Tax revenue, including payrolls, % of GDP	Central Government's share in tax revenues, %	Central Government's share in tax revenues net of transfers to regions, %
Sweden	49.5	44.9	-
Denmark	50.0	65.1	-
Finland	46.8	52.8	-
The Netherlands	48.2	57.4	-
France	44.0	45.4	-
Italy	43.2	65.5	-
Germany	39.7	32.5	-
Canada	36.1	40.5	-
Spain	34.7	51.5	-
United Kingdom	34.4	77.4	-
United States*	29.4	37.8	-
Japan*	29.4	41.9	-
Turkey	22.7	71.3	-
OECD average*	38.8	58.6	-
EU average*	41.4	63.8	-
Russia — 1992	43.6	54.8	49.5
Russia — 1993	38.8	40.6	29.8
Russia — 1994	37.3	47.2	34.1
Russia — 1995	32.1	48.1	38.6
Russia — 1996	30.3	46.2	36.4

* 1992 data
Source: OECD Revenue Statistics, World Bank staff estimates

Assignment of expenditure responsibilities. Since 1992 Russia has been going through the process of delegation of expenditure responsibilities from the

federal level to the regional level. For instance, in 1992 regions were made responsible for subsidizing food stuffs and financing individual social benefits which had previously been financed by earmarked transfers from the federal budget. Later the center also transferred to the regions the responsibility to finance social assets divested by enterprises and organizations to local authorities; pay additional child allowances; finance the new network of social protection offices; pay for health and rest facilities of WWII veterans; finance local offices of the Ministry of Internal Affairs, local military commissariats and fire fighting units; pay compensation to members of housing construction cooperatives; and finance some other expenditures. Sources of financing of these expenditures are transferred to the regions under the regional equalization fund arrangements.

Inter-budgetary transfers. The main innovation in this area was the establishment of the Fund for Financial Support of the Regions (federal equalization fund) in the second quarter of 1994. This fund was formed on the basis of a formula taking into account indicators of social and economic conditions of individual regions and was expected to ensure greater transparency in inter-budgetary relations. The objective in setting up the equalization fund was to redistribute revenues in favor of objectively poorer regions.

In the first year of its existence the equalization fund was used to provide only 22% of all transfers from the federal budget to the regions. The rest of the transfers were executed through informal channels, such as mutual settlements and short-term budgetary loans. In 1995 the regional equalization fund processed 48% of the transfers, and the very formula on the basis of which the fund was formed underwent changes. In 1996–1997 the formula used for determining the shares of individual regions was modified once again with the main emphasis being shifted from the equalization of the fiscal capacity of regions (the category of "needy regions") towards financing current expenditures of regions (the category of "most needy regions"). With the overall trend towards a reduction of the relative share of tax revenues to the federal and regional budgets, which has been observed since 1992, the amount of transfers to the regions grew from 1.7% of the GDP in 1992 to 3.6% of the GDP in 1994, before going down to 1.8% of the GDP in 1995 and 2.1% of the GDP in 1996.

Main problems of inter-budgetary relations in Russia. In spite of a number of positive changes which took place in the area of fiscal federalism in 1992–1997, there still remain several important problems which need to be

solved as soon as possible. The most critical of these problems are the following:

- inequality of the political and fiscal status of different regions. Although the practice of applying a customized approach to each region (including special bilateral agreements between the center and the region) over the entire spectrum of political, social and economic issues appears to be justified today, it is creating conditions for future instability of federal relations when subjects of the Federation will seek to raise their status to that of more fortunate ones;
- insufficient legal regulation of issues pertaining to fiscal authorities of budgets at various levels. For instance, it is not clear whether regional budgets are supposed to finance unplanned wage and benefit increases which had not been provided for in the original federal or regional budget in case federal legislation on such increases should be adopted;
- continuing lack of transparency in inter-budgetary relations between the center and the regions: the practice whereby a significant portion of transfers is channeled through mutual settlements between federal and regional budgets and short-term federal budgetary loans makes the regions spend all their efforts on "wrestling" money out of the central government;
- the actual pattern of financing of the regions from the equalization fund is noticeably different from that stipulated by the budget legislation. The main reason for this is the widely used practice of offsetting shortfalls of tax revenues to be transferred from the regions to the federal budget against the underfinancing of a number of regional programs from the federal budget;
- the very mechanism on the basis of which the equalization fund is formed has serious deficiencies: it is geared towards preserving the inequalities of social development of the regions which had developed by 1991; it offers regions no incentives for seeking their own sources of financing; the formula is linked to the amount of actual expenditures and revenues rather than normative criteria;
- the list of targeted federal programs implemented at the regional level is excessive. As a result, there is no real responsibility for implementing such programs and no control over the use of resources, which eventually leads to considerable expenditure cuts across all the programs;
- the inefficient expenditure patterns of regional budgets, first and foremost in the donor regions, that is, those regions which do not receive federal transfers from the equalization fund. Having "excessive" resources, which are as a rule accommodated in extra-budgetary funds and, therefore, are outside the

controlling authority of the legislative branch, such regions can afford the luxury of subsidizing the local economy and engaging in questionable investment projects. Thus far a considerable portion of fiscal allocations of all regional budgets has been used to subsidize production and the housing and utilities sector, which is a result of the 1992–1997 trend towards transferring the bulk of subsidization of the economy from the federal budget to regional budgets. Recent surveys have shown that among regions with the same fiscal capacity, the higher the relative level of support the region receives from the equalization fund, the more it tends to spend on subsidizing the regional economy;

- lack of regulation of inter-budgetary relations in the majority of regions at the lower and medium level. While bearing the bulk of responsibility for delivering public services, local budgets do not have a sufficient tax base of their own and have to rely almost completely on transfers from regional budgets;
- the reliance by a number of regions, *rayons* and cities on outside sources of financing by obtaining loans from commercial banks and issuing subnational securities can potentially lead some regions to financial insolvency; there is a danger that debt servicing would be possible only if regions were to cut all expenditures, including social ones.

4. Benchmarks for compiling an action program

What should be the strategy and tactics for reforming the fiscal process taking into account the above considerations?

At the stage of the compilation of macroeconomic projections and budget drafting:

- At the federal level it is necessary to ensure coordination of activities between the Ministry of Economy, the Central Bank and the Ministry of Finance in order to agree on major parameters of monetary policy being developed by the Central Bank, the overall economic and sectoral projections compiled by the Ministry of Economy, and the main guidelines of fiscal and taxation policies proposed by the Ministry of Finance. In order to overcome the existing inter-departmental barriers, the practice of such coordination and clearance must be formally legislated specifying the deadlines for the submission of draft documents to the corresponding ministries and insti-

tutions. In addition to clearing projections for the next fiscal year it is also necessary to develop and clear with these same ministries and institutions medium-term projections which would serve, *inter alia*, as targets for compiling preliminary projections for the next year. Following formal adoption by the government, current and medium-term projections, as well as estimated indices of budgetary expenditures, would have to be circulated among all subjects of the Federation to be used for information and guidance in the process of formulation of regional budgets.

This could be done by introducing amendments into the current legislation, by adopting a new law on the budget system and budget process, by including the description of the clearance procedure in the annual law on the procedure governing the submission, discussion and adoption of the law on the federal budget, and/or by subsequently reflecting this procedure in the Budget Code.

At the stage of budget formulation and adoption:

- It is necessary to strengthen the responsibility of executive agencies for developing realistic budgets, at the same time reducing the right of bodies of legislative power to introduce changes in the proposed draft budgets or adopt any other legal enactments that would lead either to an increase in expenditures and/or a shrinking of the revenue base of the budget. After the budget law has been adopted, it is necessary to make sure that the structure and parameters of the budget can only be modified through the adoption of a law or the introduction of amendments and additions to the law on the budget, with the right of legislative initiative vested exclusively in the executive branch (the government). This condition represents an indispensable prerequisite for strengthening the requirements for the executive branch to strictly adhere to the budget law and to submit full and timely reports on the budget to the bodies of legislative power.
- It is necessary to legislate that in terms of financing fiscal obligations, the budget law enjoys priority over any other legal enactments which commit the government to undertaking such obligations. An alternative solution would be to suspend the corresponding provisions of such enactments, or to provide partial financing during the current fiscal year executed in the form of a package of amendments to the effective legislation, which, however, might be difficult to implement for political reasons.
- As discussed above, it would be useful to adopt a practice whereby all public financial flows would be reflected in the budget. For this purpose, *at the first*

stage it should be possible to mechanically integrate all extra-budgetary flows, such as extra-budgetary funds, revenues and expenditures of budget sector organizations' commercial activities, with the corresponding parts of the budget. At present extra-budgetary funds and budget sector organizations submit reports directly to the Ministry of Finance or to regional financial departments, which is why from a purely technical standpoint there should be no difficulties with collecting and processing the information. A refusal by regional or local administrations to compile consolidated financial reports with account taken of extra-budgetary flows could be countered with a suspension of transfers from the higher budget, a provision that must also be legislated as an amendment to the current budget legislation.

As for tax expenditures resulting from the granting of tax incentives, a corresponding flow of information is not yet in place. However, tax authorities obtain such information from tax reporting on individual tax payers and individual taxes paid. That is why *at the second stage*, once a system for reporting tax incentives is developed, it should also be possible to include tax expenditures in the budget. Also, at the second stage it would be feasible to introduce changes in the budget classification which would enable bringing extra-budgetary transactions reflected in the budget in conformity with the generally accepted principles of classification and international practices. In turn, this would require that changes be introduced in the accounting and reporting systems of budget sector institutions. At the same time, it should be possible to start parallel consolidation of financial flows of former extra-budgetary funds with budgets at the corresponding levels, for which purpose revenues and expenditures would be channeled through budgetary accounts of the Treasury or financial department.

At the stage of determining budgetary allocations and disbursement of budgetary funds:

- It is necessary to clearly define and spell out in a legislative or regulatory act the spending authority of distributors of budgetary resources in order that to avoid a situation in which the government would be obligated to finance contracts entered into by the distributors if budgetary financing for such contracts had not been provided (or an application for such financing had not been included in the funding limit) by the Ministry of Finance or the financial department.
- It is necessary to expand the practice of executing the federal budget (maintenance of revenue and expenditure budgetary accounts) through the

Treasury system. In the light of the subjective and objective difficulties discussed above, this process should also be a staged one. The process of transition to the Treasury system of budget execution should develop along two directions: it should deepen, and it should expand. Deepening in this sense means a gradual increase in the number of budgetary revenue and expenditure accounts maintained by the Treasury as its technical capacity and ability to manage budgetary flows develops. Expanding means the development of a network of regional and rayon offices of the Treasury.

- It is important to begin and later expand the use of competitive selection procedures in the procurement of goods for the needs of the state (accumulation of stocks, reserves, procurement of military hardware), implementation of capital construction projects, and procurement for the needs of budget sector organizations (for example, computer equipment and furniture). Experience shows that competition among contractors makes it possible to save at least 15% of the budgetary resources allocated for a project. Unfortunately, the existing budget legislation has considerable gaps in terms of development of a regulatory basis for organizing competitive state procurement on a non-discriminatory basis. While tenders for individual government procurement programs can be introduced by individual government resolutions, a competitive procedure governing procurement by all budget sector organizations needs to be legislated through adoption of a special law on procurement for the needs of the state, or as a separate section of the Budget Code. That is why simultaneously with the preparation of a draft law to this effect, the government could start accepting tenders for major state procurement programs, such as procurement of food stuffs for state reserves, procurement of uniforms for the military, etc.

At the stage of controlling budget execution:

- In the process of transition to the Treasury system of budget implementation it is necessary to gradually develop a function allowing *ex ante* control of fiscal expenditures in order to considerably reduce the inappropriate use of budgetary resources and strengthen the *ex post* control once end recipients of budgetary resources have submitted reports on the use of the resources provided.
- It is necessary to require executive agencies to submit regular reports on budget implementation (and tighten such agencies' administrative responsibilities for failing to provide reports) explaining the reasons of any violations of the plan and specifying the corrective actions employed. Corresponding

changes would have to be introduced in the law on fundamental principles of the budgetary system (the new edition), or in the Budget Code.

- In addition to the treasury system, it is important to strengthen control over budgetary resources by internal supervisory bodies, such as the Control and Audit Department of the Ministry of Finance or the Presidential Administration, and also to carry out independent audits of the use of budgetary resources by budget sector organizations and private sector companies. Such audits could be carried out by Chamber of Accounting, or by audit firms winning contracts in the course of competitive tenders. Since technical constraints render blanket control and verification impossible, it is necessary to begin with the introduction or strengthening of control over the largest budgetary flows. The issues of control and administrative responsibilities for budgetary process violations is least developed in the budget legislation, which means that a special law or a Budget Code including a related section must be enacted to create the legislative framework for this process.

In the area of budget evaluation:

- Since this part of the budgetary process is currently not in place at all, at the first stage it is necessary to initiate a regular analysis of at least major budgetary expenditures, both at the level of sections, subsections and items of the budget classification, and at the level of individual recipients of budgetary funds. It appears that this could be achieved through the creation of new (modification of the existing) analytical divisions at the Ministry of Finance and financial departments which would interact with the Treasury and controlling entities and have the authority to solicit services of external consultants to resolve specific tasks. Analytical materials prepared by such divisions and their recommendations on rectifying the shortcomings revealed in the functioning of the budgetary process would be taken into account in the formulation of subsequent budgets.

In the area of inter-budgetary relations:

- As a minimum it is necessary to document the historical and actual expenditure sharing between budgets of different levels, all the way to the financing of individual items or projects. This could be done in the form of one of the amendments to the budget law, which is enacted on an annual basis. Later this could form the basis for negotiating certain changes in expenditure sharing to be documented in the Budget Code for the medium term.

- On the revenue side of the budget it would be useful to redistribute the revenue base in favor of local budgets. This could be done by increasing and assigning to local budgets on a long-term basis a certain share of the republican corporate profits tax, property tax, VAT and personal income tax.
- It is necessary to continue efforts to restructure the system of inter-budgetary transfers: reduction of transfers along non-regulated channels, expansion of the mechanism allowing the federal transfers to regions to be channeled through the federal Treasury.
- It is necessary to change the mechanism of the equalization fund with respect to the category of "needy regions": assistance should be provided to a considerably smaller number of regions focusing on those which really lag behind others in terms of their economic and social development. In the long term it would be sensible to link the provision of assistance to the region's revenue *capacity* rather than to the amount of revenue collected in the previous year (a benchmark that does not take into account regional extra-budgetary funds and does not generate incentives for regions to seek better tax collection) and to federal expenditure *standards* rather than to actual expenditures.
- The category of "most needy regions" should be eliminated in principle; it would be sensible to replace this category with a system of earmarked transfers to regions, such transfers being conditional on efficiency gains in the use of resources by regional budgets, and channeled through the treasury system. Programs that could be suitable for this arrangement are transfers for social benefits as part of the implementation of the social sector reform, transfers to finance part of the costs related to the maintenance of the housing and utilities sector in the context of the housing and utilities reform, and transfers to finance education and health.
- A third element of the transfer system could be the use of development programs, financed jointly by the center and the regions in the overall context of reduction of targeted federal programs and introduction of a ceiling on the number of programs being implemented simultaneously. Financing from the federal budget should be channeled through the treasury system on the condition that the region must come up with matching funds for program implementation in accordance with the approved schedule, as well as on the condition that the region should not be in arrears on current expenditures. The system of transfers between medium and lower levels of the budgetary system could be based on similar principles.
- In addition, it is necessary to create a legislative framework for regulating issues connected with subnational borrowing, stipulating the establishment of

a certain ceiling (e.g., as a percentage of the total amount of tax revenue) on the amount of borrowing and debt service. In this context borrowing should be interpreted in a broad sense, including the issuance of securities, loans from commercial banks and other financial and credit institutions, as well as budget arrears and conditional liabilities of the budget, such as guarantees. Corresponding provisions must be included in the draft legislation on state and municipal securities and the law on fundamental principles of the budgetary system, or in the Budget Code.

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Dejan POPOVIC

Financing Social and Cultural Rights in Yugoslavia: Tax Exemptions and Arrears

> The absolute monarch, after having deprived his subjects of their rights, should offer them an illusion of rights and liberties—iura inania.
>
> *Arnold Clapmarius*
> (17th century)

1. Introduction

On the wave of the fiscal reforms carried out during the eighties and early nineties in the majority of industrialized countries the concept of the "active" tax policy, implying the existence of numerous tax reliefs and differentiated rates, has been abandoned to a large extent. The prevailing approach was to reduce the tax rates (which had reached dramatically high levels), while broadening the taxable base. One may quite precisely express the basic idea of these reforms by the statement that *the best tax incentive is a low rate.* It was expected that within the tax neutrality approach the horizontal equity would be improved, as well as the transparency of the tax system.

The fiscal systems in the Central and East European countries (hereafter: *CEECs*) on the eve of the collapse of the communist regimes had been generally characterized by the presence of numerous tax exemptions and tax holidays, special depreciation regimes, differentiation of the rates of turnover, wage and

profits taxes among industries, as well as by discretionary powers of the executive branch to reduce taxes and customs duties.[1] In the early stages of transition, CEECs have carried out comprehensive tax reforms, strongly influenced by the recommendations of the 1991 OECD Conference. In short, these countries introduced all major taxes which could be found in OECD economies: corporation income tax, personal income tax, VAT, social security contributions, etc., while eliminating most of the tax reliefs and rate differentials within the context of improving tax neutrality. Tanzi's words served as a warning: "It would be a major error to accept the movement to a market economy while continuing to believe that policymakers can consistently make better choices than the market".[2] However, one must not risk generalizing incorrectly by stating that the tax reliefs in CEECs have been totally eliminated. Their presence reflects the desire of the legislators to promote certain sectors or regions by the means of tax policy rather than by the means of subsidies.[3]

In the Federal Republic of Yugoslavia tax reform has hardly been achieved at the federal level. It is at the level of the republics (Serbia and Montenegro) that quite comprehensive fiscal changes have been carried out so far. Since 1 January 1992 the personal income tax, the corporation profits tax, the social security contributions and the property tax have been introduced, the excises having been implemented since mid-1994. The implementation of VAT was postponed, while the personal income tax—in spite of the legal provisions which prescribe the globalization of income—has retained the features of scheduled taxes on various sources of income.

The idea that the number and scope of tax reliefs, as well as tax rates, should be reduced stood behind the fiscal reform projects in both Serbia and Montenegro.[4] However, in an environment characterized by the soft-budget constraint that used to prevail in Yugoslav public finance there existed neither genuine pressure on public expenditures to decrease (apart from the January 1994 cut aimed at curbing hyperinflation), nor serious incentive for the government to enforce strict fiscal discipline. Within such a context there is a

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1 JURKOVIC, P.: "Designing a Tax System to Promote Structural Change". In: *The Role of Tax Reform in Central and Eastern European Economies*, Paris, 1991. OECD.

2 TANZI, V.: "Tax Reform and the Move to a Market Economy: Overview of the Issues". In: *Ibid.*

3 *"Taxation and Investment in Central and East European Countries"*, Amsterdam: International Bureau of Fiscal Documentation. 1996.

4 Izvrsno vece Skupstine Srbije (1990). *"Koncepcija fiskalne reforme u Srbiji"*, Beograd: Skupstina Srbije.

strong tendency to retain quite a number of tax exemptions. It is the objective of this paper to investigate the socio-economic causes of the generous fiscal policies carried out in the Federal Republic of Yugoslavia—especially in the Republic of Serbia, since the Government of the Republic of Montenegro has played a more responsible role in that domain. This paper will also analyze the consequences of the refusals to adjust the fiscal outlays adequately—primarily those related to the financing of social and cultural rights—to the drastically reduced GDP and to enlarge the taxable base and the number of the taxpayers by eliminating excessive exemptions.

2. Fiscal Expenditures in the Post-Hyperinflationary Period

During 1992, 1993 and in January 1994 budgetary and social security deficits were being financed by monetization; such a practice caused hyperinflation which at the very beginning of 1994 ran at the pace of 312,000,000% per month. On 24 January 1994 the stabilization program ("Avramovic's program") came into force: it was truly effective, because the price growth was halted overnight. The exchange rate was set at the level of 1 dinar = 1 DEM and monetary emission was linked with currency purchases by the National Bank of Yugoslavia. It was the incomplete *currency board* which secured the monetary stability. In spite of the fact that fiscal expenditures were significantly reduced (from 68% of the GDP to 48%), during the first six-seven months of 1994 a fiscal and quasi-fiscal deficit was planned at about 4% of the GDP (due to pension and agriculture financing, budget deficits, an increase in the banks' liquidity, etc.). However, the actual deficit was smaller than planned, thanks to the reverse Tanzi–Olivera effect and a modest income increase. The financing of such a deficit came from monetary emission—actually from the post-hyper-inflation increase in real money balances, without creation of new inflation. In the fall of 1994 economic stagnation was generated; the stabilization program has actually brought monetary stability, but at a low level of economic activity, with *per capita* GDP of only half of what the country had in 1990. The economy required meaningful economic reform (privatization, liberalization, strict budget constraint), but it was not accomplished till today. In 1995 the monetary policy was more relaxed, even permissive, thus causing the increase in inflation rate (120.4%). Inflation slowed down in 1996 (59.6%) and was almost halted in the first half of 1997 due to the tight money policy that was being conducted. The rate of exchange was also stabilized (the official rate: 1 DEM = 3.3 dinars; the black market rate: 1 DEM = 3.6 dinars), but in the autumn of 1997 the dinar again lost part of its value on the black market (1 DEM = 4.3 dinars). The level

of economic activity is still low, primarily due to the lack of structural reforms and the shortage of foreign credits and direct investments.[5]

Within this context the deficits of the federal and republics' budgets, as well as that of the social security sector. They represent one of the potentially most dangerous threats for the desired stabilization. Further reductions of public expenditures have not been accomplished yet: the budgetary and social security outlays are not adjusted to the real potential of the Yugoslav economy once its GDP is halved. The overall ratio of fiscal expenditures to the GDP is about 48%; since the Federal Republic of Yugoslavia belongs to the group of lower-middle-income countries (*per capita* GDP is USD 1.300), it is supposed that the fiscal burden should be much lower. Otherwise, numerous negative economic implications appear: unliquidity, crowding out of private savings, recession trends, inflationary pressures, price distortions, increase in unemployment (be it hidden or open), transfers of funds toward non-formal sectors, etc. However, the government (both at the federal and republic level) has not been prepared so far to achieve the necessary reductions. This hesitation may be viewed as part of the general *pro-status-quo* policies conducted by the Milosevic regime (preserving the domination of the public sector, absolute control over the public TV and other major media, political pressures on the judiciary system, etc.). It also reflects the conservative attitude of those strata of the population (industrial workers, pensioners, farmers) which usually vote for the socialists—both in Serbia and in Montenegro. Therefore, the government generally avoids formally reducing the social rights previously given to the population: officially the statutory replacement rate, defined as the ratio of the pension benefit to the pension base (i.e., to the last wage) is very high (85%), health care is still almost free, education is being provided free of charge from the elementary to the university level, the number of employees in the public sector has not been adjusted proportionally either to the dramatical decline of the GDP or to the reduction in the national territory and in the number of inhabitants, social welfare is still being provided without stringent control, etc.

It is obvious that the regime is faced with the dilemma of how to finance the constitutionally guaranteed social and cultural rights,[6] especially if the fact that the number of needy people has drastically increased is taken into consideration.

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5 MIJATOVIC, B.—POPOVIC, D.: "A study on Public Finance in the Federal Republic of Yugoslavia." Preliminary version. Washington, D. C., 1997. The World Bank.

6 DIMITRIJEVIC, V.—PAUNOVIC, M.: *"Ljudska prava"*. Beograd, 1997. Beogradski centar za ljudska prava.

Table 1

Type of expenditure (1995)	Percentage of the total fiscal expenditures
Pensions	26.1%
Health care	20.3%
Unemployment insurance	2.0%
Social welfare	6.3%
Education	7.5%
Total social and cultural expenditures	62.2%

Source: Federal and republics' laws on the execution of budgets; Federal Payments Agency, "The Survey of the Social Security Funds Outlays".

The data from *Table 1* show that around 60% of the total budgetary and social security outlays may be functionally classified as expenditures on financing social and cultural rights. The fiscal capacity of the economy is insufficient to obtain the required tax and social security contributions, while the possibilities for issuing government bonds as the means of covering the deficit are very poor due to the unsettled problem of the saving deposits that had been kept by the household sector in the banking institutions of the former Socialist Federal Republic of Yugoslavia (hereafter: *ex-Yugoslavia*) and which the former federal government had guaranteed. These hard-currency deposits were supposedly spent in the years of the disintegration of ex-Yugoslavia. In addition, one may recall that the access to foreign credits is still limited. Apart from inflationary financing, the remaining solutions would thus be either to augment the tax proceeds or to cut more deeply into the fiscal expenditures.

3. Fiscal Revenue Policies

The increase of fiscal revenues is hardly a feasible alternative for several reasons.

First, two major sources of revenues in OECD countries—personal income tax and VAT—are still missing in the tax system of the FR Yugoslavia. Actually, instead of the global type of personal income tax, a series of scheduled taxes on various types of income is being applied.[7] These scheduled taxes are levied at

7 POPOVIC, D.: "Taxation and Investment in Serbia and Montenegro". In: *Taxation and Investment in Central and East European Countries*. Amsterdam, 1996. International Bureau of Fiscal Documentation.

the flat rate of 20%, with the exception of employment income (wages, salaries and fringe benefits), which since 1 January 1997 has been subject to progressive rates ranging from 0% to 30%. However, the tax on employment income—which contributes over 90% of the proceeds from the income tax—does not make no more than 1/8 of the total public revenues. One may identify various explanations for such poor performance: the rather low rate which prevailed in 1995 and 1996 (16% and 15%, respectively), the introduction of a zero-band once the progressive rates were implemented, with a large number of taxpayers in that band, the significant size of unreported employment, etc. Actually, the practice of failing to report employment or hiding from the tax authorities the exact amount of the paid wages may be understood if one takes into consideration the fact that the employment income is subject not only to the tax, but to social security contributions as well. Taken together, the taxes and social security contributions which are levied on wages make up about two thirds of the total fiscal revenues in the Federal Republic of Yugoslavia. The *overall* fiscal burden on wages (which encompasses both levies paid by the employee and levies paid by the employer) is truly excessive: in 1996 it was required to pay 1.19 dinars of various taxes and contributions on 1 dinar of the net wage; in 1997 low wages were privileged to an extent [at the level of 600 dinars (USD 90), 1 dinar of the net wage implies that 0.92 dinars of taxes should be paid], but the effects of the progression show quickly—at the level of 1.80 dinars (USD 250), 1 dinar of the net wage implies that 1.20 dinars of taxes should be paid, while at the level of 4.20 dinars (USD 570) 1 dinar of the net wage implies that 1.46 dinars of taxes should be paid.[8] If the incompetence of the tax administration in assessing and auditing the tax on business income is also taken into consideration, one should not expect that, given the present features of the tax system, the proceeds from the income tax can increase. The beginning of the implementation of the global personal income tax is still uncertain.

As already indicated, the implementation of VAT has been postponed: instead of in 1995, it will not enter into force until 1999. For the time being, a retail sales tax is being levied, bringing in about 20% of the total public revenues. The standard rate of the retail sales tax on goods in Serbia is 23%, while in Montenegro it is 28%. The reduced rates are 13% and 11%, respectively. The rate of the sales tax on services is 10% in Serbia and 7% in Montenegro. The exemptions are quite numerous, including equipment, spare parts, bread, milk, cooking oil and fat, water, medicines and medical supplies,

8 POPOVIC, D.: *"Nauka o porezima i poresko pravo"*. Beograd, 1997. Savremena administracija.

orthopedic appliances, writing and drawing supplies for schools, textbooks, publications of "special importance" in the domain of science, arts, culture and education, passenger transport and the majority of the transport of goods, public utility services, attorneys' services, life insurance, and health, educational, cultural, scientific, social welfare and sport services. In the light of such high rates one may understand why the taxpayers are trying to evade the payment of the sales tax. On the one hand, there is a permanent lobbying for transferring goods into the group which is subject to the reduced rate or exemption. On the other, it should be taken into consideration that the *suspension effect*[9] under the retail sales tax is supposed to be achieved through a written statement issued by the buyer to the supplier that the goods purchased will be used only for further processing or resale. However, the practice of issuing false statements is so widespread that the tax auditors is unable to close these channels of tax evasion.

The second reason which explains why the tax proceeds, at least in the short and medium run, cannot be significantly augmented concerns the scope of the black economy in the country. It is estimated that over one third of the GDP is produced in that sector.[10] Unprepared to carry out radical economic reforms, which would imply privatization and subsequent sound economic growth, the regime is persistently tolerating the black (gray) economy, often carried out by employees in the state owned enterprises, where the economic activity has been halted for several years. One may label such practice demagoguery: the Government of Serbia has actually enacted a prohibition on firing the excessive working force, while paying these laborers only guaranteed (minimal) wages. On the other hand, they tend to accept such *contract social*, provided they get free hands to engage in moonlighting. However, one must not neglect another major source of the black economy—the "concessions" given to the privileged members of *nomenclatura* to import duty free supplies of the goods for which there is excess demand on the market. These "concessions" take the form either of *ad hoc* (but formally granted) exemptions from the customs duties or of the informal (and illegal) tolerance of importation without customs clearing and paying of levies (import duties, excises and sales tax). It is the existence of the privileged importers that explains the fact that the rate of collection of excises on tobacco products and alcoholic beverages (defined as the ratio between the actually collected and the planned revenues) is barely 10–20%, while the contraband is flourishing. The "concessions" to smuggle oil or oil derivatives

9 TERRA, B.: *"Sales Taxation"*. Deventer, 1988.

10 BOZOVIC, G.: *"Siva ekonomija"*. Beograd, 1995. Ekonomski institut.

into the country are being granted—in the Republic of Serbia, as well as in the Republic of Montenegro—to very high ranked members of the *nomenclatura*, such practice providing evidence on the importance of the role of the organized crime in the Federal Republic of Yugoslavia.

4. Tax Exemptions and Arrears

The tax legislator in Serbia tends to display "fiscal generosity" by granting various tax exemptions, quite often in the absence of any criteria. One may quote a ruling of the Constitutional Court of Serbia that "the legislator is entitled to grant tax reliefs and exemptions to certain taxpayers within the context of conducting the tax policy".[11] Such entitlement effectively means arbitrariness: in contrast to the postulate of the 1992 fiscal reform that the tax reliefs should be limited in scope and granted only when strict criteria are met, the tax concessions are being given to various interest groups—industrial workers, farmers, pensioners, small entrepreneurs, even lawyers. The examples are numerous: the zero-band in the system of the tax on wages in textile and machine industry is twice the size in other sectors, the services rendered by attorneys are exempt, too many entrepreneurs are granted the privilege to pay the tax on business income according to a lump-sum assessment, a newly established taxpayer always enjoys a tax holiday (ranging from one to six years), the base for the tax on income from agriculture and forestry—the cadastral yield—is being revalued irregularly and by applying indexes which are lagging behind the rate of inflation, all the pensions are tax exempt, the tax credit when a taxpayer resides in his own house or apartment reaches 80% of the property tax liability, etc.

In general, even where a support to certain sectors or regions is justifiable, tax reliefs seem to be preferable to subsidies from the point of view of politicians. It is worth mentioning that no calculations about the amount of the tax reliefs are required in the budgetary procedure. Being less transparent, the tax reliefs enable the government to promote chosen social groups, enterprises or industries with a minimal degree of parliamentary control. Thus, in a society which is essentially pseudo-democratic, it is simply the relative

11 Decision of the Constitutional Court of the Republic of Serbia U 273/94, of 2 February 1995.

strength of various lobbies which determines who will receive certain tax reliefs.[12]

In addition to the above-mentioned tax reliefs, the Government of Serbia applies even more arbitrary exemptions: the National Assembly of Serbia adopted legislation which entitles the tax authorities to postpone the payment of the tax in cases when the taxpayer "objectively" is unable to fulfil his tax obligation. In practice this means that a number of "privileged" taxpayers—usually socially-owned and public enterprises, but also certain private enterprises owned by the prominent members of the *nomenclatura*—are actually exempt (bearing in mind that the rate of interest for late payments used to be lower than the rate of inflation). Furthermore, the media have registered examples of the unauthorized but tacitly approved tolerance of payments of wages and salaries without tax and social security contributions being withheld.

One may extensively discuss the impact of such "fiscal generosity" on the general tax morality in the country, on the horizontal equity or on the functioning of the principle of legality. However, it is my intention here to point out only the effect on the financing of the social and cultural rights (pensions, health care, unemployment benefits, social welfare, education). Having fallen into a *Procrustean bed* of the constitutionally prescribed abundance of human rights of this kind and having been deeply involved in the practice of granting generous tax exemptions, the regime in the Federal Republic of Yugoslavia (especially the Government of Serbia)—faced with the dilemma of whether to cut expenditures (which could prove to be a politically dangerous move) or to raise taxes (which in the above-mentioned circumstances may prove as unfeasible)—opted for the "third way". The magician's trick is called *arrearage*.

The concept is simple: the planned tax proceeds are overestimated and, consequently, the budgets are balanced. As the year passes, the payments to the recipients of the budgetary funds are permanently being delayed. Therefore, the arrears become significant: in mid-June 1997 the Public Pension Fund of Serbia was in debt to pensioners for four monthly pensions (USD 500 million). The Serbian Health Insurance Fund was in debt to the suppliers for USD 200 million, the salaries having been paid only up until the first half of April. Teachers were paid similarly. The budget of Serbia also owed children's benefits (USD 100 million) and was in debt to the farmers for the agricultural products delivered in 1996 (USD 80 million). The salaries of university personnel were

12 POPOVIC, D.: "Tax Incentives and the Need for Tax Neutrality: The Yugoslavian Experience". In: *The Role of Tax Reform in Central and Eastern European Economies*. Paris, 1991. OECD.

paid for the first half of March, thus being late for 2.5 months. The salaries of the budgetary beneficiaries—already set very low (e.g., the full professor is supposed to receive from the budget less than USD 270 after taxes)—were actually halved. Psychologically, the aim of diminishing the budgetary and social insurance outlays and not admitting the reduction has been achieved. But the chosen way proves to be extremely unjust. The victims of this process those who represent the least threat to the regime (children, old people, patients and doctors, teachers). As soon as a social group organizes a strike (which is not an easy task, because most of the unions are controlled by the government), concessions are made and a half salary is usually paid to that group; others are, however, exposed to even more severe arrears. The prospect of a general strike remains unlikely, since the industrial workers have been quite passive so far and the employees in the public sector and the beneficiaries of the social and cultural rights quite disunited.

The legal protection of the monetary dimension of the above-mentioned human rights can be viewed in light of several civil law cases where pensioners have sued the Public Pension Fund for unpaid pensions. These cases have been pending in the courts for months, even years, yet no verdict has gone into effect. This fact sheds light on the political pressures facing the judicial system. It can be concluded that effective remedies in this domain are lacking.

In addition, the judicial system may even be characterized as cynical considering a verdict of the Constitutional Court of Serbia which proclaimed the taxation of pension income unconstitutional.[13] The Court pointed out that the Constitution of the Republic of Serbia, while prescribing that the pensions be financed by the employees, other insured persons and employers, via the pension funds managed by the insured persons and the beneficiaries, actually prohibited any diminishing of pension benefits, including diminishing by taxation. Since 1993, when the decision of the Constitutional Court was implemented in the Personal Income Tax Act, neither contributions nor pension benefits have been taxed. One may question whether the reasoning of the Court is in line with other constitutional provisions, especially with Article 52, proclaiming that *everyone* is obliged to pay taxes, and Article 69, proclaiming the *ability-to-pay* principle. In any case, the point cannot be missed: on one hand, the Constitutional Court is defending the "inviolability" of the pension rights by revoking the legal provisions on (actually very low) taxation of the pension income, thus creating a demagogic illusion that the retired people are

13 Decision of the Constitutional Court of the Republic of Serbia of 15 July 1993, *The Official Gazette of the Republic of Serbia*, no. 56 of 1993.

particularly protected; on the other hand, the Court (as well as the entire judicial system in Serbia) has not yet provided judicial protection for the victims of the budget arrears.

5. Conclusions

The Federal Republic of Yugoslavia considers itself legally bound by the conventions signed and ratified by ex-Yugoslavia. A legal analysis would show that the human rights contained in the U. N. Covenant on Economic, Social and Cultural Rights, ratified by the Federal Assembly of ex-Yugoslavia, are correctly integrated into the Constitution of the Federal Republic of Yugoslavia. The same applies to the U. N. Covenant on Civil and Political Rights. In my opinion, the prohibition-of-discrimination clause from Article 26 of the Covenant on Civil and Political Rights is actually being infringed upon by the discriminative arrears carried out by the Yugoslavian authorities. The Human Rights Committee decided that the infringement of Article 26 existed even in cases when discrimination is related to the rights envisaged in the Covenant on Economic, Social and Cultural Rights—for which the competence of the Committee had not been established.[14] However, since Yugoslavia has not ratified the Optional Protocol, these cases of discrimination cannot be presented to the Human Rights Committee.

The absence of an effective domestic remedy and the closed doors towards the Human Rights Committee leave the beneficiaries of social and cultural rights in Federal Republic of Yugoslavia (especially in Serbia) with poor chances to resist the budget arrears. Actually, radical democratic reforms of the society are required as a presumption for elimination of the fiscal demagoguery and discriminative delays in payments of pensions and salaries. Only then will responsible government be established, based on the principle of the rule of law and not on providing *iura inania.*

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14 *Zwaan-de Vries vs. The Netherlands*, 1987, In: *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Vol. II, New York: United Nations.

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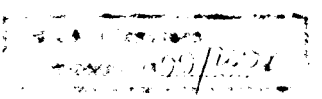

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